Office - Supreme Court, U.S.
FILED
SEP 24 1982
ALEXANDER L. STEVAS,
CLERK

82-534

no.

In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1982

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DUKE UNIVERSITY, INC., et. al.,
Respondent

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DR. HOWARD E. STRAWCUTTER, et. al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Grover C. McCain, Jr.
Counsel of Record
Jeff Erick Essen
McCAIN, ESSEN & ORCUTT
1829 E. Franklin Street
100-E Franklin Square
Chapel Hill, North
Carolina 27514
(919) 967-0811

Counsel for Petitioner

George Rountree, III
J. Harold Seagle
ROUNTREE & SEAGLE
11 South Fifth Street
Wilmington, North
Carolina 28401

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

This appeal raises the following two important questions of Federal Civil Procedure under Rule 41(a) which have not been directly decided by this Court but which have been decided differently by the various circuit courts of appeal:

(1) DO F.R.CIV.P. 41(a)(1)(ii) AND F.R.CIV. P. 41(a)(2) PERMIT A PLAINTIFF TO TAKE A DISMISSAL AGAINST LESS THAN ALL OF SEVERAL DEFENDANTS?

(2) WHEN A PLAINTIFF AND CERTAIN DEFENDANTS AGREE TO A F.R.CIV.P. 41(a) DISMISSAL OF THEIR LITIGATION ON CERTAIN CONDITIONS, CAN OTHER DEFENDANTS OR THE TRIAL COURT VETO THAT DISMISSAL BY REFUSING TO CONSENT?

In addition, this appeal raises the following two questions of Federal Civil Procedure which require this court, in its supervisory capacity, to correct the trial court's departure from the accept-

ed and usual course of judicial proceedings (as sanctioned by the Court of Appeals) and to provide needed guidance to other federal trial courts:

(3) EVEN IF THE PLAINTIFF DID NOT INVOKE A STIPULATION OF DISMISSAL UNDER RULE 41(a)(1)(ii) AND EVEN IF THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT PLAINTIFF'S RULE 41(a)(2) MOTION TO DISMISS THE DUKE DEFENDANTS WITHOUT PREJUDICE, COULD THE COURT GRANT THE DUKE DEFENDANTS' SUBSEQUENT RULE 41(b) MOTION FOR AN INVOLUNTARY DISMISSAL WITH PREJUDICE BASED ON THE COURT'S PERCEPTION THAT PLAINTIFF COULD NOT PREVAIL AT TRIAL?

(4) WHEN THE TRIAL COURT OF ITS OWN VOLITION ASSURES COUNSEL PRIOR TO CLOSING ARGUMENTS THAT IT WILL GIVE THE STATE PATTERN JURY INSTRUCTIONS ON INFORMED CONSENT AND PLAINTIFF'S COUNSEL THEREFORE DOES NOT REQUEST AN INFORMED CONSENT INSTRUCTION SPECIFICALLY TAILORED TO THE FACTS OF THE CASE, CAN THE

COURT ON ITS OWN INITIATIVE DELETE THE IN-FORMED CONSENT INSTRUCTION AFTER CLOSING ARGUMENTS HAVE ALREADY BEEN MADE?

PARTIES

Two civil actions were consolidated for trial and for appeal before the Fourth Circuit:

Samuel Clyde Morrell, an incompetent person by his Committee, Henry Clyde Morrell, Plaintiff - Petitioner,

v.

Duke University, Inc., Duke University Medical Center, Duke Hospital, David F. Paulson, M.D. and Michael J. Moran, M.D., Defendant - Respondents,

and

Luis Gonzalez-Serva, M.D., Southeastern General Hospital, and Warren L. Williamson, M.D., Defendants - (not parties to the appeal in the Fourth Circuit)

Samuel Clyde Morrell, an incompetent person by his Committee, Henry Clyde Morrell, Plaintiff - Petitioner

v.

Dr. Howard E. Strawcutter, Dr. William R. Burleson and Dr. J. Thomas Leininger, individually and as partners, doing business under the common name and style of Urology Clinic at all times material to the action, Defendant - Respondents

TABLE OF CONTENTS

Questions presented for review..... i

Parties..... ii

Table of authorities.....viii

Opinions below..... 1

Jurisdiction..... 1

Rules of Civil Procedure Involved..... 2

Statement of the case..... 5

Reasons for granting certiorari..... 14

I. F.R.CIV.P. 41(a)(1)(ii) AND F.R.CIV.P. 41(a)(2) PERMIT A PLAINTIFF TO TAKE A DISMISSAL AGAINST LESS THAN ALL OF SEVERAL DEFENDANTS..... 14

II. WHEN A PLAINTIFF AND CERTAIN DEFENDANTS AGREE TO A F.R.CIV.P. 41(a) DISMISSAL OF THEIR LITIGATION ON CERTAIN CONDITIONS, NEITHER THE TRIAL COURT NOR OTHER DEFENDANTS MAY VETO THAT DISMISSAL BY REFUSING TO CONSENT..... 25

III. EVEN IF THE PLAINTIFF DID NOT INVOKE A STIPULATION OF DISMISSAL UNDER RULE 41(a)(1)(ii) AND EVEN IF THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT PLAINTIFF'S RULE 41(a)(2) MOTION TO DISMISS THE DUKE

DEFENDANTS WITHOUT PREJUDICE, THE COURT DID NOT HAVE THE POWER TO GRANT THE DUKE DEFENDANT'S SUBSEQUENT RULE 41(b) MOTION FOR AN INVOLUNTARY DISMISSAL WITH PREJUDICE BASED ON THE COURT'S PERCEPTION THAT PLAINTIFF COULD NOT PREVAIL AT TRIAL..... 34

Conclusion..... 39

IV. WHEN THE TRIAL COURT OF ITS OWN VOLITION ASSURES COUNSEL PRIOR TO CLOSING ARGUMENTS THAT IT WILL GIVE A PATTERN JURY INSTRUCTION ON INFORMED CONSENT AND PLAINTIFF'S COUNSEL THEREFORE DOES NOT REQUEST AN INFORMED CONSENT INSTRUCTION SPECIFICALLY TAILORED TO THE FACTS OF THE PARTICULAR CASE, THE COURT CAN NOT OF ITS OWN INITIATIVE DELETE THE INFORMED CONSENT INSTRUCTION AFTER CLOSING ARGUMENTS HAVE ALREADY BEEN MADE..... 42

Conclusion..... 48

Appendix A: OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS. 50

Appendix B: ORDER DENYING MOTION FOR REHEARING EN BANC..... 76

Appendix C: MOTION HEARING OF MARCH 9, 1981, BEFORE THE HONORABLE W. EARL BRITT, UNITED STATES DISTRICT COURT JUDGE..... 77

Appendix D: AMENDED ORDER FOR INVOLUNTARY DISMISSAL..... 100

Appendix E: MOTION UNDER RULE 41..... 103

Appendix F: CONSENT TO GRANTING OF MOTION..... 104

Appendix G: ORDER OF DISMISSAL WITHOUT PREJUDICE..... 105

Appendix H: OBJECTION TO MOTION UNDER RULE 41..... 107

Appendix I: ORDER..... 108

Appendix J: MEMORANDUM AND RESPONSE... 109

Appendix K: RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ITS RULE 41(a)(2) MOTION..... 112

Certificate of Service..... 116

TABLE OF AUTHORITIES

CASES	Pages
Alamance Industries, Inc. v. Filene's 291 F.2d 142 (1st Cir., 1961) cert. denied 368 U.S. 831	31
Bankers Trust Co. v. Mallis 435 U.S. 381 (1978) (per curiam)	27,42
Banque de Depots v. National Bank of Detroit, 491 F.2d 753 (6th Cir., 1974)	29
Battle v. Municipal Housing Authority for City of Yonkers, 53 F.R.D. 423 (S.D.N.Y. 1971)	23
Beneficial Finance Co. of Portsmouth, Inc. v. Lucas, 27 Fed. R. Ser. 896 (4th Cir., 1979)	27
Blue Mountain Construction Co. v. Werner, 270 F.2d 305 (9th Cir., 1959)	38
Broadway & Ninty-Sixth Street Realty Corporation v. Loew's 23 F.R.D. 9 (S.D.N.Y., 1958)	28
First National Bank of Toms River N.J. v. Marine City, Inc., 411 F.2d 674 (3rd Cir., 1969)	23
Harkless v. Sweeney Independent School District of Sweeney, Texas 554 F.2d 1353 (5th Cir., 1977)	27

Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir., 1953); cert. denied, 345 U.S. 964 — 17,18,19, 20,24,26

Jackson v. Sanitarium 234 N.C. 222, 67 S.E. 2d 57 (1951) — 36

Link v. Wabash Railroad Co., 370 U.S. 626 (1972) — 38

McCargo v. Hedrick, 545 F.2d 393 (4th Cir., 1977) — 38

Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir., 1980) — 22,27

Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc. 474, F.2d 250 (5th Cir., 1973) — 22

Sanchez v. Vaughn Corporation, 282 F. Supp. 505 (D.C. Mass., 1968) — 26

Shuford v. K. K. Kawamura Cycle Co., 649 F.2d 261 (4th Cir., 1981) — 32

Smither v. Collins, 52 N.C. App 255, 278 S.E.2d 286 (1981) — 36

Societe Internationale v. Rogers, 357 U.S. 197 (1958) — 36

Southern Electric Generating Co. v. Allen Bradley Co. 30 F.R.D. 135 (S.D.N.Y., 1962) — 28

Stone v. Proctor, 259 N.C. 633, 131 S.E. 2d 297 (1963) 36

Terry v. Pearlman, 42 F.R.D. 335 (Mass., 1967) 21

United States v. Wyoming National Bank of Casper, 505 F.2d 1064 (10th Cir., 1974) 29

Watwood v. Barber, 70 F.R.D. 1 (N.D. Georgia, 1976) 23.27

Webb v. Nolan, 361 F. Supp. 418 (W.D.N.C., 1972), aff'd 484 F.2d 1049 (4th Cir., 1973) 32

Williams v. Ezell, 531 F.2d 1261 (5th Cir., 1976) 26

Wilson and Co. v. Fremont Cake & Meal Co., 83 F. Supp. 900 (D.C. Neb., 1949) 27

Young v. Wilky Carrier Corp. 150 F.2d 764 (3rd Cir., 1945) cert. denied 326 U.S. 786 21,28,29

OTHER AUTHORITIES

5 Moore's Federal Practice, §41.06-1 21

9 Wright and Miller, Federal Practice and Procedure, §2362 20

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals, dated May 5, 1982, and unpublished, is printed in Appendix A. The order denying rehearing en banc is printed in Appendix B. The transcript of the motion hearing of March 9, 1981, in which the trial court ultimately denied plaintiff's Rule 41 (a)(2) motion is contained in Appendix C and the court's order granting the defendant's Rule 41 (b) motion is contained in Appendix D.

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit was filed on May 5, 1982, and its order denying rehearing en banc was filed on June 29, 1982. This Court has jurisdiction pursuant to Section 1254(1) of Title 28 of the United States Code.

RULES OF CIVIL PROCEDURE INVOLVED

Questions 1 and 2 of this appeal involve F.R.CIV.P. 41(a) which reads as follows:

> (a) VOLUNTARY DISMISSAL: EFFECT THEREOF:
> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without an order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems pro-

per. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Question 3 of this appeal involves

F.R.CIV.P. 41(b) which reads as follows:

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against

> the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Question 4 of this appeal involves F.R.CIV.P. 51 which reads as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

On July 16, 1976, Samuel Clyde Morrell was a 25 year old resident of South Carolina. On that date he developed nausea and fatigue and he was admitted to Southeastern General Hospital in Lumberton, North Carolina under the care of Dr. Strawcutter and his associates. The admitting diagnosis was kidney infection, relating to a congenital abnormality. By the morning of July 22 Sammy's condition had deteriorated and his physicians realized that he was not responding to systemic antibiotic medication.

Although there is no such notation in the medical chart, the Strawcutter defendants contend that they had diagnosed a perinephric abscess and were ready to perform the necessary urgent surgery by this date. In any case, an early morning discussion was held between Sammy's family and Dr. Strawcutter in which Dr. Strawcutter agreed to arrange the patient's transfer to

Duke Hospital. It is uncontested that Dr. Strawcutter never discussed a perinephric abscess with Sammy or his family nor discussed any dangers in delaying the immediate drainage of that abscess by transferring the patient to a hospital three hours away.

At approximately 8:00 p.m. on July 22 Sammy left Southeastern General Hospital by ambulance and he arrived at Duke Hospital shortly before midnight. His condition was immediately diagnosed as perinephic abscess but, since Sammy had become dehydrated during the ambulance trip, surgery was delayed until the afternoon of July 23, 1976.

Shortly after surgery, Sammy developed high fevers, which were uncontrolled by the Duke hospital personnel, and he suffered seizures and severe anoxic damage to the brain. Since that time he has remained totally and permanently disabled- unable to walk, talk or do anything for himself. He has required constant nursing care since this

catastrophe. By the time of the trial of this action, more than $250,000 had been expended by or on behalf of the plaintiff for medical and nursing care with the prospect of continued large expenditures for the rest of his life.

These two civil actions, consolidated for trial, alleged medical and hospital negligence against the defendants. The plaintiff, Henry Clyde Morrell, was the guardian, or committee, of his son, Samuel Clyde Morrell, who had been adjudicated as being incompetent due to the severe brain damage allegedly proximately caused by the negligence of the defendants in these two actions. Federal jurisdiction was predicated on diversity.

The action against defendants Howard E. Strawcutter, William R. Burleson and J. Thomas Leininger (hereinafter referred to as the Strawcutter defendants) was filed on February 1, 1978. The action against Duke University, David F. Paulson, Michael J. Moran

hereinafter referred to as the Duke defendants) along with Southeastern-General Hospital and Warren L. Williamson was filed on July 19, 1979. The two cases were consolidated for discovery and trial by order on November 26, 1979. Thereafter, the Strawcutter defendants moved to sever its case from that of the Duke defendants. The motion was denied on April 18, 1980, "without prejudice, however, to the rights of any interested party to renew the motion at the final pre-trial conference at which time the issues to be tried will be more sharply defined."

Prior to the conference of attorneys before the final pre-trial conference, plaintiff filed a motion pursuant to Rule 41(a)(2) requesting that the Court dismiss the Duke defendants without prejudice to the right of the plaintiff to refile the action against the Duke defendants within one year in any state court having proper jurisdiction (Appendix

E.) The Duke defendants filed their consent to the granting of this motion (Appendix F). On February 20, 1981, without holding any hearings, the Court entered an order granting plaintiff's motion (Appendix G). On February 26, 1981, defendant Southeastern General Hospital, Inc. filed an objection to the dismissal of the Duke defendants (Appendix H) and, because defendants had not had an opportunity to be heard on plaintiff's 41(a)(2) motion, the Court, by order dated March 3, 1981, rescinded its order granting plaintiff's motion (Appendix I) and scheduled the matter for hearing on March 9, 1981. Prior to that hearing, defendant Southeastern General Hospital, Inc., withdrew its previously filed objection and stated to the Court that it would not be prejudiced by the granting of plaintiff's motion (Appendix J). Also, at the hearing, the remaining

defendants stated in open court that none of them had any objection to the granting of plaintiff's motion, although none were willing to consent to it (Appendix C). The Court, however, denied plaintiff's motion under Rule 41(a)(2) and directed all parties to prepare for trial (Appendix C). Plaintiff's motion to reconsider was also denied despite the continued support of the Duke defendants dated March 26, 1981 (Appendix K).

Thereafter, in response to interrogatories previously served upon the plaintiff by the Duke defendants, plaintiff acknowledged that he had not expected to go to trial against the Duke defendants and he did not currently have any expert witnesses ready to testify on the question of negligence as to those defendants. On April 7, 1982, the Duke defendants who also had not expected to go to trial, filed a motion for dismissal of plain-

tiff's action against them with prejudice under the provisions of Rule 41(b). By order of April 8, 1981, the Court then granted the involuntary dismissal motion of the Duke defendants and entered judgment against the plaintiff as to them. The defendant Luis Gonzales-Serva, a resident at Duke at the time of the events in question, had left the continental United States, was never served with process and the Court never acquired jurisdiction over his person. Therefore, the case against him was dismissed. Although, plaintiff's claims with defendant Southeastern General Hospital, Inc., were settled prior to trial and that defendant did not participate in trial, the Court refused to sign an appropriate order confirming the partial settlement and dismissing the action against that defendant with prejudice until the conclusion of the trial.

Without objection from the plaintiff, the action against Dr. Warren L. Williamson was dismissed with prejudice by summary judgment on March 24, 1981.

The action against the Strawcutter defendants proceeded to trial by jury before Judge W. Earl Britt in Fayetteville, North Carolina, and was tried for more than two weeks beginning April 27, 1981. Upon the jury's verdict of no negligence, the Court entered judgment thereon on May 13, 1981, in favor of these defendants. From the entry of that judgment, from the denial of plaintiff's Rule 41(a)(2) motion and from the entry of the order of involuntary dismissal under Rule 41(b) as to the Duke defendants, the plaintiff perfected an appeal to the Fourth Circuit Court of Appeals.

In an unpublished decision dated May 5, 1982, the Fourth Circuit Court of Appeals affirmed all the actions of the

trial court and on June 29, 1982 the plaintiff's petition for rehearing en banc was denied.

REASONS FOR GRANTING CERTIORARI

I.

F.R.CIV.P. 41(a)(1)(ii) AND F.R.CIV.P. 41(a)(2) PERMIT A PLAINTIFF TO TAKE A DISMISSAL AGAINST LESS THAN ALL OF SEVERAL DEFENDANTS.

In an ordinary civil lawsuit, no one should have the power to force a plaintiff and defendant to continue litigation after they have agreed to a settlement of their dispute. In the present case the plaintiff and the Duke defendants agreed to a Rule 41(a) dismissal of their action without prejudice to the right of the plaintiff to refile that action in state court within one year. After the fortuitous chain of events that led to the dismissal of the Duke defendants with prejudice, those defendants argued in the Court of Appeals that the plaintiff actually never had the power to obtain a voluntary dismissal against them under either Rule 41(a)(1)(ii) or Rule 41(a)(2) since there were other defendants in the lawsuit.

The factual history of plaintiff's attempt to dismiss the action against the Duke defendants is outlined in the Court of Appeals'concurring opinion as follows:

> . . . because of the expense of caring for their son and preparing the case against the Strawcutter defendants, the plaintiff's parents could not afford to engage an expert witness to testify against the Duke defendants. The plaintiff's attorney properly realized that he could not proceed against the Duke defendants without the support of expert testimony. Confronted by the inability to obtain an expert, he did the next best thing. Months before trial, he obtained the consent of the Duke defendants for a voluntary non-suit without prejudice. But because he did not receive the consent of all defendants, he was unable to proceed within the letter of rule 41(a)(1)(ii). Consequently, he moved for dismissal of the Duke defendants without prejudice pursuant to rule 41(a)(2). The Duke defendants consented to this motion, and the court granted it. Later, however, when another party objected, the court rescinded tne order of dismissal. [Appendix A, p.72]

At the rehearing of this motion, the trial court indicated that it was faced with the question of "whether plaintiff and defendant, Duke University, may agree for Duke University

to get out" [Appendix C, p.77]

Answering this question requires the resolution of the following two intertwined issues: (1) whether the Rules permit a plaintiff to take a dismissal against less than all of several defendants (the issue discussed in this section of the argument) and (2) whether an agreement of dismissal between a plaintiff and some but not all of the defendants can be vetoed by another defendant or the court itself (discussed in section II of this argument). Each of these issues turns on the definition of the word "action" in Rule 41(a).

The various federal circuits have produced different definitions of the word "action" and thus different interpretations of Rule 41. As the Duke defendants explained in their brief in the Court of Appeals:

> Plaintiff develops at some length one branch of the dichotomy of case law which is addressed to the propriety of a dismissal under Rule 41(a)(2) of an action as against less than all of several Defendants. The divided case

> law turns upon the construction to be given to the word "action" as it appears in the first sentence of Rule 41(a); i.e., whether "action" in Rule 41(a) means all claims against any one Defendant, and hence a voluntary dismissal under the Rule against less than all of several Defendants is proper, or whether "action" in Rule 41(a) means the entire controversy against all Defendants, and hence a voluntary dismissal under the Rule is not proper as against less than all of the several Defendants. (p.7)
>
> . . . if the Court adheres to that branch of the case law dichotomy represented by the leading case of Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F. 2d 105 (2d Cir. 1953); cert. denied, 345 U.S. 964, 97 L. Ed. 1383, 73 S. Ct. 949, the Harvey Aluminum decision supporting the view that partial dismissal cannot be effected by mere notice under Rule 41(a)(1)(i), partial dismissal in the case at bar would be improper under Rule 41 - whether such be under 41(a)(1)(i) or 41(a)(1)(ii) or 41(a)(2) . . . (p.7-8)

As the defendants had encouraged, the Fourth Circuit did indeed follow the lead of the Harvey Aluminum case. In his briefs in the Court of Appeals, plaintiff cited extensive authority for the proposition that plaintiff's Rule 41(a)(2) "motion," with the

consent of the defendants to be dismissed, was actually effective as a stipulation of dismissal under Rule 41(a)(1)(ii) without any act or exercise of discretion on behalf of the trial court and without any consent by other defendants. The Fourth Circuit recognized that this issue had been preserved on appeal but dismissed the argument with a reference to Harvey Aluminum and an implication that the plaintiff's stipulation of dismissal had not been signed by all parties who had appeared in the "action."

In their brief in the Court of Appeals, the Duke defendants traced the evolution of this troubling division of authority on the definition of the word "action" in Rule 41:

> The division of federal authorities apparently originated in 1953 when a District Court in the Seventh Circuit permitted the Government to dismiss thirty-six of the Defendants in an action alleging [conspiracy] to violate antitrust statutes, the Government moving the Court for dismissal of these Defendants without prejudice under Rule 41(a)(2). The Court allowed the Government's motion, though noting that not all of the

Defendants were so released, and hence it was not applying Rule 41(a) to the entire "action". United States v. E. I. DuPont De Nemours & Co., 13 F.R.D. 490 (Ill. 1953). One month later, the Second Circuit, in Harvey Aluminum, construed the term "action" as used in Rule 41(a) to denote the "entire controversy", and not just a "claim" or "cause of action", holding that Plaintiff was precluded from taking a voluntary dismissal by notice under Rule 41(a)(1)(i) as against only certain of the Defendants - the Court holding that the proper method for eliminating only certain of the Defendants would be under Rule 21 providing that parties may be dropped or added by Order of Court and on Motion. This was the leading case of Harvey Aluminum Company, Inc. v. American Cyanamid Co., supra. As cited by Plaintiff in the case at bar, the District Court in Massachusetts thereafter followed the 1953 E.I. DuPont decision, supra, in Terry v. Pearlman, 42 F.R.D. 335 (Mass. 1967), the Court holding in Terry that Plaintiff's dismissal by notice under Rule 41(a)(1)(i) could be effected against four of five Defendants, with the Court construing the word "action" as used in Rule 41(a)(1) to mean all of the claims against any one or more of the Defendants and not necessarily all of the claims against all of the Defendants (p.8-9).

Although the Second Circuit has generally adhered to the view expressed in Harvey Aluminum and the Fourth Circuit has now

joined that school of thought, other circuits have developed a consensus that Rule 41(a) allows a plaintiff to take a voluntary dismissal with regard to one of several defendants. Treatises uniformly recognize both the existence of the conflict and the infirmity of the Harvey Aluminum position:

> Both branches of Rule 41(a) refer to dismissal of 'an action.' This led the Second Circuit to hold that 'the word "action" as used in the Rules denotes the entire controversy, whereas "claim" refers to what has traditionally been termed "cause of action,"' and that, accordingly, a plaintiff that wanted to dismiss with regard to one of several defendants could not use Rule 41(a) but had to proceed under Rule 21. Some other courts followed the Second Circuit and adopted the same interpretation. The sounder view and the weight of authority are, however, to the contrary. (9 Wright and Miller, Federal Practice and Procedure, §2362)
>
> This brings us to situation 1, where plaintiff seeks to dismiss as to a party who is not misjoined and whose presence does not destroy diversity. Although the Harvey Aluminum case indicates the contrary, and has sometimes been followed, the better view is that the court has power to permit the dismissal under Rule 41. And this should hold true whether it

> is fewer than all the defendants against whom a dismissal is sought to be taken, or fewer than all the plaintiffs seeks to withdraw from the action.
>
> Moreover, where appropriate, such dismissal should be allowed under either Rule 41(a)(1) or 41(a)(2). (5 Moore's Federal Practice, §41.06-1)

A clear consensus exists that under Rule 41(a)(2) a court can order the dismissal of a "action" against one of several co-defendants. Young v. Wilky Carrier Corp., 150 F. 2d 764 (3rd Cir. 1945) cert. denied 326 U.S. 786 (a dismissal of one of two defendants upheld under Rule 41(a)(2) over objection of another defendant). Most courts have interpreted Rule 41(a)(1)(i) to allow a plaintiff to take an automatic dismissal of an action against one of several defendants, as long as the defendant to be dismissed has not himself filed an answer - without the stipulation or consent of other parties, Terry v. Pearlman 42 F.R.D. 335 (Mass. 1967) (filing of answer by another defendant was irrelevant). In Plains Growers,

Inc. v. Ickes-Braun Glasshouses, Inc., 474, F. 2d 250, 254 (5th Cir. 1973), the Court wrote:

> The difficulty comes from the use of the identical word 'action' in Rule 41(a)(2) which requires a court order. There is little merit in an argument that the court could not dismiss the action as to less than all defendants upon motion, and yet there is nothing in the Rule to indicate an intent to make the word 'action' mean 'all' in 41(a)(1) and mean less than 'all' in 41(a)(2).

Although few cases have been reported under Rule 41(a)(1)(ii), a plaintiff also has the right to take an automatic dismissal of an "action" against one of several co-defendants by stipulation.

> Several courts have not objected to stipulations dismissing individual parties or claims to a lawsuit without dismissing the entire controversy. See Pipeliners Local Union No. 798, Tulsa, Oklahoma v. Ellerd, 503 F. 2d 1193 (10th Cir. 1974); Rudloff v. Johnson, 267 F. 2d 708 (8th Cir. 1959); Battle v. Municipal Housing Authority for City of Yonkers, 53 F.R.D. 423 (S.D. N.Y. 1971). [Oswalt v. Scripto, Inc. 616 F. 2d 191, 195 (5th Cir. 1980)]

Other courts have agreed, Watwood v. Barber, 70 F.R.D. 1,3 (N.D. Georgia, 1976) (allowing dismissal of one of several co-defendants under Rule 41(a)(1)(ii); Battle v. Municipal Housing Authority for City of Yonkers, 53 F.R.D. 423, 424, (S.D.N.Y., 1971) (upholding stipulation dismissing two defendants in their individual capacity); First National Bank of Toms River, N.J. v. Marine City Inc., 411 F. 2d 674 (3rd Cir. 1969) (upholding stipulation dismissing third party defendants only). These cases explicity or implicitly define "action" in Rule 41(a) as being a claim asserted by a party against a particular defendant.

Although the consensus of federal authority permits a dismissal against fewer than all of several defendants under either Rule 41(a)(1)(i), Rule 41(a)(1)(ii), Rule 41(a)(2) or Rule 41(b), federal courts have sometime attempted to restrictively interpret certain clauses of the Rule. Indeed, the

trial court in this case was apparently so confused by the requirements of Rule 41 that he refused to enter an order approving plaintiff's monetary settlement with Southeastern General Hospital until after the trial against the Strawcutter defendants. The Fourth Circuit has now followed the Harvey Aluminum decision and the time has come for this Court to conclusively interpret Rule 41. The mere existence of other defendants, without cross-claims, should not preclude a plaintiff from obtaining a proper dismissal under Rule 41(a)(1)(ii) or Rule 41(a)(2) against one defendant.

II.

WHEN A PLAINTIFF AND CERTAIN DEFENDANTS AGREE TO A F.R.CIV.P. 41(a) DISMISSAL OF THEIR LITIGATION ON CERTAIN CONDITIONS, NEITHER THE TRIAL COURT NOR OTHER DEFENDANTS MAY VETO THAT DISMISSAL BY REFUSING TO CONSENT.

As discussed above, the threshold question in interpreting Rule 41(a) is whether or not that rule permits a dismissal against less than all the defendants in the lawsuit. The resolution of that question necessarily answers the question of who must consent to a Rule 41(a)(1)(ii) dismissal since both issues depend on an interpretation of the word "action." The Rule reads in pertinent part as follows: "an action may be dismissed by the plaintiff without an order of court. . . by filing a stipulation of dismissal signed by all parties who have appeared in the action" (emphasis added).

Clearly the word "action" can not have two different meanings in the same sentence. If this Court rejects the Harvey Aluminum school of authority and accepts the consensus definition of "action" as "all of the claims against one or more of the defendants," then Rule 41(a)(1)(ii) clearly requires consent only by those defendants to be dismissed.

Due to the above-discussed confusion in the language of Rule 41(a)(1)(ii), plaintiff's counsel in the present case framed his document of dismissal as a Rule 41(a)(2) "motion" with the consent of the Duke defendants. Courts have consistently ruled, however, that when a Rule 41(a)(1) right exists, the requested dismissal is automatically effective without order of court despite the fact that the request is framed as a motion, Williams v. Ezell, 531 F.2d 1261, 1263-64 (5th Cir., 1976), Sanchez v. Vaughn Corporation, 282 F. Supp. 505, 507 (D.C.

Mass., 1968), Wilson and Co. v. Fremont Cake & Meal Co., 83 F. Supp 900, 903 (D.C. Neb., 1949), Watwood v. Barber, 70 F.R.D. 1,3 (N.D. Georgia, 1976), Harkless v. Sweeney Independent School District of Sweeney, Texas, 554 F.2d 1353, 1360 (5th Cir., 1977), Oswalt v. Scripto, Inc., 616 F.2d 191, 195 (5th Cir., 1980), Beneficial Finance Co. of Portsmouth, Inc. v. Lucas, 27 Fed. R. Serv. 896, 897 (4th Cir., 1979). All these decisions are in accord with the mandate of this Court that the Federal Rules be given a "common sense" interpretation, Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) (per curiam). Thus, if this Court recognizes that Rule 41(a)(1)(ii) does not require consent by defendants not privy to the dismissal, then plaintiff's Rule 41(a)(2) "motion" with the consent of the Duke defendants was automatically effective as a stipulation of dismissal under Rule 41(a)(1)(ii).

If the actions of the parties did not constitute a Rule 41(a)(1)(ii) stipulation of dismissal, then the question of whose approval is required for a consensual dismissal must be explored under Rule 41(a)(2), itself. Admittedly the language of that Rule offers no guidance as to whether or not a dismissal agreed to by the plaintiff and the defendants to be dismissed can be vetoed by the court or another defendant.

Some circuits have recognized that a co-defendant having no cross-claims and no stake in the dismissal does not have the power to force a plaintiff and defendant to continue litigation after they have agreed to a settlement of their dispute. Young v. Wilky Carrier Corporation, 150 F.2d 764 (3rd Cir., 1945) cert. denied 326 U.S. 786; Broadway & Ninety-Sixth Street Realty Corporation v. Loew's Inc., 23 F.R.D. 9 (S.D.N.Y., 1958); Southern Electric Generating Co. v. Allen Bradley Co., 30 F.R.D. 135

(S.D.N.Y., 1962). Other circuits have held that a court considering a Rule 41(a)(2) motion should consider the objections of other defendants not sought to be dismissed, United States v. Wyoming National Bank of Casper, 505 F.2d 1064 (10th Cir., 1974), Banque de Depots v. National Bank of Detroit, 491 F.2d 753 (6th Cir., 1974).

This confusion was reflected in the actions of the trial court in the present case which originally followed the Young v. Wilky Carrier Corp. authority and granted plaintiff's Rule 41(a)(2) motion based on the consent of the Duke defendants and without any hearing involving the other defendants. After Southeastern General Hospital voiced an objection to the dismissal, the court switched its interpretation of the Rule, decided that other defendants had a right to be heard and rescinded the order of dismissal.

Even if other defendants had a right to veto the agreement of dismissal between plaintiff and the Duke defendants, the actions of all parties at the motion hearing of March 9, 1981, indicate that no defendant objected to the dismissal at that time. The defendant Southeastern General Hospital withdrew its previously filed objection stating, through counsel, that it would not be prejudiced by the granting of plaintiff's motion. The Strawcutter defendants indicated that they expected to use the alleged negligence of the Duke defendants as a causation defense (as they ultimately did at trial) and merely requested a 60-day continuance if the Duke dismissal was granted.

Thus, it was ultimately the trial judge, himself, who vetoed the consensual dismissal of the Duke defendants, apparently through concern for his own docket. Again, a division of federal authority exists on the propriety of this reasoning. Some circuits

have held that such a concern is an insufficient reason to deny a Rule 41(a)(2) dismissal, Alamance Industries, Inc. v. Filene's, 291 F.2d 142 (1st Cir., 1961) cert. denied 368 U.S. 831 ("Courts exist to serve the parties and not to serve themselves, or to present a record with respect to dispatch of business. . . . For the court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary considerations over primary. . . ."). Other circuits, including the Fourth Circuit in this case, have reached a different result.

Significantly, the agreement of dismissal between the plaintiff and the Duke defendants provided that the case could only be refiled in a state court. The only other condition in the dismissal agreement was the specific provision that plaintiff would have the right to refile within one year regardless of statutes of limitation - a right plaintiff would have had, anyway, under North

Carolina substantive law, Webb v. Nolan, 361 F. Supp. 418 (W.D.N.C., 1972), aff'd 484 F.2d 1049 (4th Cir., 1973), Shuford v K. K. Kawamura Cycle Co., 649 F.2d 261 (4th Cir., 1981).

In rejecting plaintiff's appeal, the Fourth Circuit wrote:

> A most sympathetic case from the plaintiff's point of view here illustrates the great importance of counsel's doing things right. Each failure to dot "i"s and cross "t"s contributed to a multiplication of error to the point where a result unfavorable to the plaintiff was the consequence. [Appendix A, p.50]

The troubling truth is that Rule 41(a) has been subjected to so many contradictory interpretations by the federal courts that an attorney, even after extensive research, can only guess as to which "i"s to dot and which "t"s to cross. Even within the Fourth Circuit, in an identical situation, plaintiff's counsel would have no guidance as to how to effect a consensual dismissal without prejudice. The right of voluntary dismissal

contained in Rule 41(a) is a right of paramount importance in civil litigation. Until this Court chooses to interpret that right, however, it exists only as a Trojan horse for unfortunate plaintiffs like Sammy Morrell.

OLD COUNCIL TRA
BOND
100% COTTON FIBER

III.

EVEN IF THE PLAINTIFF DID NOT INVOKE A STIPULATION OF DISMISSAL UNDER RULE 41(a)(1)(ii) AND EVEN IF THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT PLAINTIFF'S RULE 41(a)(2) MOTION TO DISMISS THE DUKE DEFENDANTS WITHOUT PREJUDICE, THE COURT DID NOT HAVE THE POWER TO GRANT THE DUKE DEFENDANT'S SUBSEQUENT RULE 41(b) MOTION FOR AN INVOLUNTARY DISMISSAL WITH PREJUDICE BASED ON THE COURT'S PERCEPTION THAT PLAINTIFF COULD NOT PREVAIL AT TRIAL.

Following the thwarted attempt by the plaintiff and the Duke defendants to dismiss their litigation under Rule 41(a), the Duke defendants filed a motion for involuntary dismissal under Rule 41(b). Not surprisingly, the plaintiff admitted that he was not desirous of presenting a case against the Duke defendants, at that time, and he did not have any experts prepared to testify against

these defendants.

Rule 41(b) allows a pretrial involuntary dismissal only upon the plaintiff's failure to comply with a rule or order of court or failure to prosecute Admittedly plaintiff had not listed experts in response to the Duke defendant's interrogatories but this failing was based on the simple fact that he had no experts to list - not on any willfulness or bad faith.

This Court has previously reversed a trial court's involuntary dismissal, ostensibly under Rule 41(b), based on the plaintiff's inability to comply with a pretrial production order. After holding that the power to dismiss a complaint because of plaintiff's failure to comply with such an order depended exclusively upon Rule 37, rather than Rule 41(b), this Court wrote:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against

> the opinions of the Court in Hovey v. Elliott, 167 U.S. 409, and Hammond Packing Co. v. Arkansas, 212 U.S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules Rule 37, 28 U.S.C. (1952 ed.), p.4325. [Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958)]
>
> In view of the findings in this case, the position in which the petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner. [Id. at 212]

Significantly, North Carolina law allows a plaintiff to prevail in some medical malpractice cases without the testimony of expert witnesses, Smithers v. Collins, 52 N.C. App. 255, 278 S.E.2d 286 (1981), Jackson v. Sanitarium, 234 N.C. 222, 67 S.E.2d 57 (1951), Stone v. Proctor, 259 N.C. 633, 131 S.E.2d

297 (1963). Although plaintiff did not have experts prepared to testify against the Duke defendants, because of lack of funds, he had prepared a lengthy settlement brochure outlining his contentions which had been delivered to the Duke defendants months earlier. He should have been allowed to elicit facts in support of these contentions of negligence against the Duke defendants from the defendants, themselves, and in the trial of the Strawcutter action such admissions of Duke negligence did, in fact, emerge. At that point, of course, such admissions served only as a causation defense for the Strawcutter defendants.

In the Court of Appeals, the Duke defendants argued a "failure to prosecute" rather than a failure to comply with a rule or order of court in justification of the Rule 41(b) dismissal. The accepted and usual course of judicial proceedings, however, as reflected by the available case law under

that provision, prohibits a dismissal for "failure to prosecute" unless the plaintiff is personally responsible for a clear record of delay or contumacious conduct, McCargo v. Hedrick, 545 F.2d 393 (4th Cir., 1977). Typically this harsh sanction is invoked only when the plaintiff refuses to proceed or to attend pre-trial conferences, Link v. Wabash Railroad Co., 370 U.S. 626 (1972), Blue Mountain Construction Co. v. Werner, 270 F.2d 305 (9th Cir., 1959). In the present case, the plaintiff's counsel admitted that he did not wish to try the case at that time. At no point, however, did he refuse to proceed or to attend any judicial function.

Under the facts of this case, it is clear that there was no basis for a dismissal under Rule 41(b) and the trial court actually dismissed the plaintiff's case because he did not think plaintiff could prevail at trial. Except in the narrow confines

of Rule 56, with its attendant notice requirements, a trial court is simply not allowed to make such a determination. Although the trial court's unfamiliarity with the Federal Rules of Civil Procedure can be explained by his recent ascent to the bench, this Court must exercise its supervisory capacity to review such a departure from the accepted and usual course of judicial proceedings.

CONCLUSION

Rules of Civil Procedure exist to insure a just and orderly trial on the merits of each controversy. They exist as a means to serve the people in the resolution of their disputes, not as a maze through which parties must wander in seach of justice. Over the last fifty years this Court has produced - through promulgation and interpretation - a federal procedure that is basically functional and fair.

Rule 41, on the other hand, stands alone in the Federal Rules of Civil Procedure as

difficult to understand and deadly if misunderstood. Perhaps no other rule has been so variously interpreted by different circuits and, yet, this rule purports to enunciate the standards for the most fundamental of all procedural rights - the orderly termination of a plaintiff's entire action.

When a plaintiff and a defendant reach a resolution of their controversy, Rule 41 should clearly guide the parties and the court to the achievement of that desired end. In this case, the Fourth Circuit never suggested that a plaintiff and a defendant do not have the power to effect such a resolution. Instead, that court pointed to a perceived failure on the part of plaintiff's counsel to dot "i"s and cross "t"s. In light of the diversity of opinion among the federal circuits and the trial court's own chameleonic interpretation of Rule 41, it is hardly surprising that mere attorneys have difficulty in discerning

the requirements of that Rule. If the federal courts choose to deprive the brain-damaged Sammy Morrell of his chance for just compensation based on the dot of an "i", it will be just one more atrocity in the nightmare from which he and his family will never escape.

This Court must fulfill its obligation to all federal litigants to insure that the Rules of Civil Procedure operate to assist, rather than frustrate, the just determination of every action on its merits. Plaintiff respectfully requests that this honorable Court grant this writ of certiorari in order to conclusively determine the issues raised herein.

OLD COUNCIL BOND 100% COTTON FIBER

IV.

WHEN THE TRIAL COURT OF ITS OWN VOLITION ASSURES COUNSEL PRIOR TO CLOSING ARGUMENTS THAT IT WILL GIVE A PATTERN JURY INSTRUCTION ON INFORMED CONSENT AND PLAINTIFF'S COUNSEL THEREFORE DOES NOT REQUEST AN INFORMED CONSENT INSTRUCTION SPECIFICALLY TAILORED TO THE FACTS OF THE PARTICULAR CASE, THE COURT CAN NOT OF ITS OWN INITIATIVE DELETE THE INFORMED CONSENT INSTRUCTION AFTER CLOSING AGRUMENTS HAVE ALREADY BEEN MADE.

F.R.CIV.P. 51 allows parties to file requested jury instruction and requires the court to "inform counsel of its proposed action upon the requests prior to their arguments to the jury." This rule does not specifically require the court to similarly inform counsel on those elements of its charge not specifically requested by any party. Nevertheless, a "common-sense" interpretation of the Federal Rules of Civil Procedure, Bankers Trust Co. v. Mallis, 435 U.S.381, at

387, (1978) (per curiam), must recognize that when counsel receive assurances from the court that an adequate pattern jury instruction will given, they have the right to rely on those assurances without personally requesting a specific instruction.

The circumstances of the jury charge in this case are summarized in the concurring opinion of the Court of Appeals as follows:

> Before summation, the court advised counsel of his proposed instructions in accordance with rule 51. At that time, it stated that it would give an informed consent charge as set forth in the North Carolina pattern jury instructions, but later it omitted this charge when it instructed the jury. At the conclusion of the instructions, the attorney called the court's attention to the omission, and, complying with rule 51, he noted an objection The court acknowledged that the attorney had requested the charge and that initially the court had agreed to give it. Upon reflection, however, it had deleted the charge. . . . It is true that an instruction on informed consent could have been more felicitously phrased, but after the attorney received assurances that the pattern instruction would be given, his decision not to offer an alternative is quite understandable. (Appendix A, p.74)

The primary opinion of the court, however, states:

> . . . the instruction plaintiff's counsel now insists should have been given had not been requested by counsel. It was originally included in the charge at the district judge's own initiative, just as it was subsequently deleted by him. [Appendix A, p.64]
>
> Morrell's counsel did not request an instruction as to possible negligence deriving from a failure to express adequately the risks in the Strawcutter defendants' acquiescing in the transfer to Duke University Hospital and the attendant delay. He consequently has no valid complaint. . . . [Appendix A, p.67]

The writer of this opinion makes other conclusions in dictum on the appropriateness of the informed consent instruction and the adequacy of the charge. It is clear, however, that the Court felt that counsel's "failure to dot 'i's and cross 't's" (Appendix A, p.50) precluded him from "assigning error to this incident of trial" (Appendix A, p.74).

In the trial of this action, plaintiff pursued alternative theories of negligence. First, the plaintiff introduced evidence that

the Strawcutter defendants were negligent in their care and treatment of Sammy Morrell by failing to make proper diagnostic tests and examinations, failing to diagnose his perinephric abscess and failing to perform a timely operation to drain the abscess. The defendants, on the other hand, claim that they had diagnosed perinephric abscess, had simply failed to enter the diagnosis in the chart and had not operated because of the family's desire to transfer Sammy to the Duke Medical Center for any needed operation. As an alternative theory of negligence, plaintiff introduced evidence to show that if the defendants had actually diagnosed Sammy's perinephric abscess, then they were negligent in failing to inform him of that abscess, its attendant hazards and consequent dangers of any delay in the drainage of the abscess necessitated by a transfer to Duke Hospital.

The jury was instructed on the first theory of negligence, and they apparently believed the contention of the Strawcutter defendants that they had actually made the diagnosis of the abscess and were simply prevented from draining it by the decision of the family to transfer their son to another institution. That set of facts should have triggered a consideration of plaintiff's second theory of negligence: the failure of the Strawcutter defendants to warn the family of any delay in draining this large abscess although the defendants acquiesced in and actually arranged the patient's transfer to Duke Hospital. The Court, however, decided, on the morning of its charge, to eliminate the previously agreed upon instruction on this issue and decided not to give the jury any instruction on the issue of failing to inform. That decision was reversible error.

The Court of Appeals apparently agreed

with the defendants' argument that plaintiff was precluded from raising this issue on appeal and thereby sanctioned the trial court's departure from the obvious requirement of Rule 51. The rules of the game can not be changed after the game is played and a trial court is not allowed to change the jury charge after final arguments have already been made. This Court has the responsibility of interpreting and enforcing the Federal Rules of Civil Procedure thereby assuring fair play to all parties in the Federal Courts.

CONCLUSION

Rule 51 recognizes that counsel must be informed of the court's jury charge before closing arguments are made in order to effectively utilize that right. Although the strict language of the rule only requires the court to inform counsel of its action upon their "requests," this Court has repeatedly held that these rules must be liberally construed to effect their purpose.

When the trial court of its own volition assures counsel prior to closing arguments that it will give a pattern jury instruction and plaintiff's counsel therefore does not request an instruction on that issue tailored to the facts of the particular case, the court should not have the power to delete that instruction after closing arguments have already been made. This Court must continue to enforce its common-sense interpretation of the Rules of Civil Procedure. Contrary precedent must not be allowed to stand

where it infringes on an important right called into play in every single federal trial - the right to make an effective closing argument.

Plaintiff respectfully requests that this petition for a writ of certiorari be granted in order to fully explore the issue discussed herein.

This 24 day of September, 1982.

Grover C. McCain, Jr.
Counsel of Record

Jeff Erick Essen
McCAIN, ESSEN & ORCUTT
100-E Franklin Square
1829 E. Franklin Street
Chapel Hill, NC 27514
(919) 967-0811

George Rountree, III

J. Harold Seagle
ROUNTREE & SEAGLE
11 South Fifth Street
Wilmington, NC 28401

OLD COUNCIL TRE

APPENDIX

APPENDIX A

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS

Argued March 2, 1982 Decided May 5, 1982

MURNAGHAN, Circuit Judge:

A most sympathetic case from the plaintiff's point of view here illustrates the great importance of counsel's doing things right. Each failure to dot "i"s and cross "t"s contributed to a multiplication of error to the point where a result unfavorable to the plaintiff was the consequence. Plaintiff can point to occasions where omission or oversight of counsel could have been counteracted by the district judge's treating as done what ought to have been done. However, the fact that there was discretionary relief available does not mean that a refusal to grant it constitutes error. So to hold would be to obliterate the

concept of trial court discretion. We know of course that such discretion is broad, and that abuse of discretion must be shown for a party to prevail on appeal. We have concluded that no adequate grounds have been advanced which merit reversal or remand, and we affirm.

The plaintiff, Samuel Clyde Morrell, was born with congenital extrophy of the bladder. Under the supervision of Dr. Howard E. Strawcutter, at the age of twenty-six, he was admitted to Southeastern General Hospital. It was determined that an operation was necessary. Plaintiff's family urged that, rather than have Strawcutter and his assistants (together the other Strawcutter defendants) perform the operation, Morrell be transferred to Duke University Hospital for the operation to be conducted there by Duke University Hospital personnel. The Strawcutter defendants

acquiesced in the transfer decision, failing, however, to inform Morrell's family of possible risks attributable to the delay resulting from the removal of Morrell to Duke.

Following the operation at Duke, Morrell's condition has become tragic in the extreme. In the words of his counsel, he is a vegetable.

Separate actions, one against the Strawcutter defendants, one against the Duke Defendants and Southeastern General, were instituted in the United States District Court for the Eastern District of North Carolina. They were consolidated. At a time when the plaintiff claims he was entitled to a

F.R.CIV.P. 41(a)(1)(ii)[1] voluntary

---

1 Rule 41. Dismissal of Actions.
(a) Voluntary Dismissal: Effect Thereof.
(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

dismissal without prejudice based on a stipulation allegedly signed by all parties who had appeared in the action,[2] his counsel filed instead a F.R.CIV.P. 41(a)(2)[3] motion seeking dismissal of Duke defendants without prejudice to

---

2 Cf. Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953), cert. denied, 345 U.S. 964 (1953).

3 Rule 41. Dismissal of Actions.
(a) Voluntary Dismissal: Effect Thereof.

. . .

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

reinstitution of the suit at some later date. The Duke defendants consented; the Strawcutter defendants did not object. However, consent of court must be obtained for a Rule 41(a)(2) motion. For whatever reason, perhaps conservation of judicial resources by requiring both actions, involving substantial overlap of proof, to be tried together,[4] the

---

4 A motion to sever the Strawcutter defendants' case from that of the Duke defendants was denied by the district court. On that occasion plaintiff's counsel took the position that the "two cases are literally the same case with some of the Defendants being named in one case and the remainder in the second, (and) the case should logically be prepared and tried as one case."

district court refused to grant a Rule 41(a)(2) voluntary dismissal without prejudice.

Morrell's attack on that denial of relief is only secondarily directed at a supposed abuse of discretion because of the district judge's refusal to exercise the powers conferred by Rule 41(a)(2). Rather, it concentrates on the failure by the district judge to recast the motion as a Rule 41(a)(1)(ii) motion masquerading as a Rule 41(a)(2) motion and to grant it in that guise. We may assume that such an unmasking of a disguise was a possible course for the district judge to follow, 5 Moore's Federal Practice § 41.02(2) (1981); but he was by no means obliged to do so. If one does not avail oneself of a privilege afforded by the Rules, but chooses instead to follow a different course, one may be held to the choice one has made.

Here that is particularly the case where the district court clearly was entitled to consider the impact on its docket if the quest for relief of Morrell were allowed to run its full course against the Strawcutters alone, and then were permitted to begin all over again against the Duke defendants. Inevitablely that would lead to a substantial amount of repetitive testimony.[5] Considerations

---

5 Plaintiff, in opposing severance, asserted:

> If the cases are separated, the Defendants in one case will have to be witnesses in the other case; when the second case is tried, the Defendants in the first case will have to be witnesses in that case.
> . . .

not unlike those preventing piece-meal appeals were present.[6]

---

6 A concession by the Duke defendants at oral argument acknowledged that the Rule 41(a)(1)(ii) point had been preserved for appellate purposes. That may well be the case even absent such a concession in view of the liberal interpretation the rules receive. See 5 Moore's Federal Practice § 41.07 at 41-100 (1981). However, we mention in passing that prudence would have dictated mention of the point in the notice of appeal. Plaintiff, however, as to the Duke defendants, only appealed "from the entry of the order of involuntary dismissal under Rule 41(b)." F.R.A.P. 3(c) requires that "the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." It could be argued that the appellant consciously restricted the appeal to the separate Rule 41(b) contention hereinafter discussed.

Thereafter, while the Rule 41(a)(2) motion remained undisposed of by the court, so that the Duke defendants were still parties, the preparation of the case for trial proceeded. Plaintiff's counsel concentrated effort on the case against the Strawcutter defendants. Interrogatories of the Duke defendants were responded to only on the day trial was to commence.[7] Morrell's counsel could provide no expert witness list and was not ready to proceed against the Duke defendants. Burdened by extremely high medical bills, the plaintiff and his family simply could not, according to

---

7 By agreement with the Duke defendants, plaintiff was excused from filing answers to interrogatories until plaintiffs' Rule 41 (a)(2) motion was denied. The denial first came on March 9, 1981, and was renewed on March 24, 1981, following a motion by plaintiff for reconsideration. The answers to interrogatories were filed on April 6, 1981, the date on which the case was called for trial.

counsel, afford to retain an expert to testify against the Duke defendants. He acknowledged that the prospect of settlement in light of negotiations which were taking place and his expectation that the pending Rule 41(a)(2) motion for voluntary dismissal without prejudice would be granted had caused him to be unprepared to proceed against the Duke defendants.

It requires no extended discussion, however, to establish that such prospects or expectations are insufficient to excuse counsel from getting the case ready for trial. Plaintiff here had not obtained any expert witness to establish failure of the Duke defendants to adhere to medical norms of acceptable performance. The absence of such testimony would be fatal to many a plaintiff's case under North Carolina law. Smithers v. Collins, 52 N.C. App. 255,278 S.E.2d 286, 289-290

(1981). In any event plaintiff's counsel conceded "that he had no evidence . . . which he could present at the trial."

The next step was a motion by the Duke defendants for an involuntary dismissal with prejudice under Rule 41(b). It was granted. The district judge observed that "Plaintiff could interpose no objection or responsive argument in opposition to said Motion for Involuntary Dismissal."

The grant of the Rule 41(b) motion was not an abuse of discretion. It was evident that counsel had resorted to an established practice of suing everyone who might conceivably be liable, without first investigating sufficiently to be in a position to prove that one or more such defendant had, in fact, failed in any way to perform with due care. The conse-

quences of the practice are harrowing enough for any defendant. For doctors and hospitals they are especially disturbing. Their whole professional careers, or reputations as health care providers are at stake. It constitutes no abuse of discretion to decide, as the district judge decided, that, when a case has come to the day of trial, it is incumbent upon the parties to be ready.

As we have held that denial of the motion for voluntary dismissal without prejudice was proper, reliance by plaintiff on hope that it would be granted was inappropriate. The possibility of denial was not something that counsel for the plaintiff could safely ignore. The Duke defendants were entitled to freedom from the overhanging threat of the case where the plaintiff had

to confess that he lacked the evidence necessary to establish a right to recovery.

The case did proceed against the Strawcutter defendants and resulted in a jury verdict for the defendants. Morrell objected to the district judge's deletion from his charge of an "informed consent to treatment" instruction after he had initially indicated to counsel that one would be given. The district judge had determined, on reflection, that the facts of the case did not warrant the instruction. We are satisfied that he was right.

The facts of the case would have merited an instruction that negligence might be found in a failure adequately to inform the patient

and his family of risks associated with a doctor's decision not to treat, such as the one made here to step aside in favor of the Duke University Hospital. However, that was not the instruction the deletion of which Morrell's counsel objected to.[8] The instruction read:

> Consent may be either expressed or implied. Express consent is authorization

---

8 Indeed the instruction plaintiff's counsel now insists should have been given had not been requested by counsel. It was originally included in the charge at the district judge's own initiative, just as it was subsequently deleted by him.

to perform the treatment or operation either through written or spoken words. Consent is implied when the actions or conduct of the patient reasonably warrant the belief that he consented to the operation or treatment.

For either type of consent to be valid, the patient must be reasonably informed of the risks involved. Consent is not valid if it is induced by representations that are false to the knowledge of the practitioner who makes them. Further, except in an emergency, a practitioner has a duty to make a reasonable disclosure of the risks involved if the treatment or operation involves known risks of which it is likely that the patient is unaware.

There is no hard and fast rule as to the extent of disclosure required. Where the likelihood of an adverse result is relatively slight, much must be left to the discretion of the practitioner in determining what he should tell the patient as to possible adverse consequences. While the patient has the right to an informed election as to whether to undergo the proposed treatment or operation, it must be borne in mind that the practitioner's primary concern at the time of consultation is, and should be, the treatment of the patient's illness or disability, not preparation for the defense

> of a possible lawsuit. Obviously, an increase in the normal anxiety of one about to undergo an operation or treatment is not medically desirable. Advice which is calculated to increase such anxiety by recounting unlikely possibilities of undesirable consequences is not consistent with the above stated duty of the practitioner to his patient. A different situation is presented where the practitioner know(s), or should know, that the proposed operation, treatment, or drug has a high ratio of adverse reaction or complications of a serious nature, not likely to be known to the patient.
>
> The practitioner should disclose any danger of which he has knowledge and of which the patient needs to be advised in order to determine intelligently whether to consent to the risk. Breach of this duty is negligence.

The charge manifestly is cast in terms of consent to an operative procedure or affirmative treatment, not of a consent that the physician decline to operate or otherwise refrain from treating in deference to a performance by others of the indicated medical procedure. Morrell's counsel makes a nice lawyer's argu-

ment that, just as not-to-decide may be to decide, so not-to-treat may be to treat. However, a jury's charge is for laymen, and the district judge was entitled to conclude that such convolution was likely to confuse the jury, and could well appear to indicate the presence in the case of factors which simply were not there.

Morrell's counsel did not request an instruction as to possible negligence deriving from a failure to express adequately the risks in the Strawcutter defendants' acquiescing in the transfer to Duke University Hospital and the attendant delay. He consequently has no valid complaint about a failure to give a somewhat superficially similar, but in actuality quite different, and in the circumstances inappropriate, instruction, an instruction potentially productive

of confusion in the jurors' minds.

Furthermore, considering the charge to the jury as a whole, the point was elsewhere adequately dealt with in the instructions which were given reading:

> In this case, the plaintiff contends, and the defendants deny, that Drs. Strawcutter, Burleson and Leininger were negligent in their care and treatment of Samuel Clyde Morrell in July of 1976 by abandoning his care while he was a patient in the hospital, by failing to make reasonable and proper diagnostic tests and examinations to make a diagnosis of his condition and in failing to properly treat his condition . . . .
>
> A physician is not bound to render professional services to everyone who applies. But when a physician undertakes the care and treatment of a patient, the relationship cannot be terminated at the mere will of the physician but must last until the treatment is no longer required, or until it is dissolved by consent of the parties, or until reasonable notice is given in order that the patient may have an opportunity to engage the services of another. The failure of the physician to use reasonable care and judgment in determining when his attendance

may properly and safely be discontinued is negligence.

Finally, Morrell contends that the district judge erred in his order requiring the removal of Morrell from the courtroom after the first day and a half of trial. He was permitted to return for counsel's closing arguments. Of course, the immediate reaction is that a party, to have his day in court, must be allowed to be present throughout the trial. However, there are cases, and this is one, where exclusion of a party does not prejudice in any way the presentation of his case, and is necessary to achieve fairness for the other party. Morrell, displaying some of the cruelties to which fate had subjected him, emitted grunts and groans which led counsel and his relatives to rush to his side with a consequent interruption of the proceedings. Morrell's presence for a

day and a half of trial and for closing arguments afforded ample opportunity for the jury to assess the visible nature of his condition. His behavior, while in no way to be criticized, had become so intrusive as to infringe on orderly presentation and to generate undue sympathy. There is no contention that his presence could have affected in any way the presentation of his case. In his vegetable state, that simply was not possible. Morrell's counsel did not object to the exclusion, only requesting that Morrell be permitted to be present during closing arguments. The request was fully granted.

Accordingly, there was no abuse of discretion in the ruling that led to absence of Morrell from the courtroom for part of the trial.

AFFIRMED

JUDGE BUTZNER, with whom JUDGE CACHERIS joins, concurring:

I concur in holding that the district court's dismissal of the Duke defendants with prejudice was not an abuse of discretion. I also agree that the instructions to the jury were adequate and that the district court did not err by refusing a charge after initially indicating that it would be given. The court's removal of the plaintiff was not an abuse of discretion. Therefore, I concur in the judgment.

I disassociate myself, however, from dicta that I believe unjustifiably criticizes the plaintiff's attorney. He was unprepared to prosecute the claim against the Duke defendants for reasons beyond his control. Quite simply, because of the expense of caring for their son and preparing

the case against the Strawcutter defendants, the plaintiff's parents could not afford to engage an expert witness to testify against the Duke defendants. The plaintiff's attorney properly realized that he could not proceed against the Duke defendants without the support of expert testimony. Confronted by the inabillity to obtain an expert, he did the next best thing. Months before trial, he obtained the consent of the Duke defendants for a voluntary non-suit without prejudice. But because he did not receive the consent of all defendants, he was unable to proceed within the letter of Rule 41(a)(1)(ii). Consequently, he moved for dismissal of the Duke defendants without prejudice pursuant to Rule 41(a)(2). The Duke defendants consented to this motion, and the court granted it. Later, however,

when another party objected, the court rescinded the order of dismissal. Confronted with the reinstatement of the Duke defendants and the plaintiff's inability to proceed against them without an expert, the attorney wisely tried to settle. When negotiations proved unsuccessful, he candidly acknowledged that the plaintiff could not proceed to trial against the Duke defendants. The court then granted Duke's motion to dismiss with prejudice. The plaintiff's attorney should not be faulted, I think, for arguing that his motion under 41(a)(2) and the consent that it elicited were tantamount to a stipulation with the Duke defendants under the more favorable provisions of 41(a)(1)(ii).

The issue pertaining to the court's instructions to the jury also presents no occasion for criticizing plaintiff's

attorney. Before summation, the court advised counsel of his proposed instructions in accordance with rule 51. At that time, it stated that it would give an informed consent charge as set forth in the North Carolina pattern jury instructions, but later it omitted this charge when it instructed the jury. At the conclusion of the instructions, the attorney called the court's attention to the omission, and, complying with rule 51, he noted an objection. The court acknowledged that the attorney had requested the charge and that initially the court had agreed to give it. Upon reflection, however, it had deleted the charge. Again, the attorney is not to be faulted for assigning error to this incident of trial and for supporting the assignment with the argument that the pattern instruction was appropriate. It is true that an instruction on

informed consent could have been more felicitously phrased, but after the attorney received assurances that the pattern instruction would be given, his decision not to offer an alternative is quite understandable.

This was a difficult case fraught with serious consequences for all parties. From a review of the records, I am confident that the district judge did not base his rulings on the fanciful notion that the plaintiff's attorney failed to dot"i's" and cross "t's." Furthermore, for my part, our disposition of the appeal dealt with the merits of the case, and it was not tainted by reliance on such a flimsy premise.

APPENDIX B

ORDER DENYING MOTION FOR REHEARING EN BANC

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Mur[illegible]ghan with the concurrence of Judge Butzner and Judge Cacheris (U.S.D.J.).

For the Court,

/s/ William K. Slate, II

CLERK

filed June 28, 1982

APPENDIX C

MOTION HEARING OF MARCH 9, 1981, BEFORE THE HONORABLE W. EARL BRITT, UNITED STATES DISTRICT COURT JUDGE

The Court: Morrell against Strawcutter. Gentlemen, I know that we have here today to be decided whether, plaintiff and defendant, Duke University, may agree for Duke University to get out. And we may have some other things, I don't know about that.

Let's address ourselves to that aspect at the beginning.

Mr. Harris, I understand that you no longer object.

Mr. Harris: That is correct, your honor.

The Court: You did at one time, but you don't any longer?

Mr. Harris: I did at one time, your honor. If you would like an explanation, I would be glad to give it to you.

The Court: You need not explain. I

received it in writing and I take it just as you said it.

Well, let me ask you if any party has any objection as to the proposed dismissal?

Mr. Clay: Your honor, my name is Bob Clay, and together with Mr. Lee and Hal Broadfoot, I represent the defendants Strawcutter, Burleson and Leininger. This is a response to the Court's inquirey, but it's not exactly what you were asking for. We do not object to the litigants to let this party out, but we do not consent to it.

Our posture is this: Because of the structure this lawsuit has and because of the fact that it just isn't good strategy for co-defendants in a medical malpractice case to fight among themselves, we are not in a position at this time to go forward with what we considered to be an important element of truth re-

garding causation in this case. And we would ask the Court, that if you grant this motion, the Court also grant a 60 day moratorium in this case, that is put back the pre-trial conference that is scheduled for Wednesday this week, and put back the trial day, which is presently scheduled for jury selection on April 6th, for two months as well. So that we would have the opportunity to prepare our proof or alter our proof in such a way as to address issues that up until the time that this motion was made and granted would have been matters of proof as between the plaintiff and the defendant Duke.

We are not saying that we want time to go after Duke. We simply have to address the question of causation as to what happened while the plaintiff was at Duke.

The Court: Haven't you been privy to

all the discovery that has taken place up until now?

Mr. Clay: I'm sorry, your honor.

The Court: Haven't you been privy all the discovery that has taken place up to now? And don't you know what happened up at Duke?

Mr. Clay: We have the Duke records and a number of depositions have been taken. However, we haven't asked any questions based upon causation at Duke because of the posture of the case.

The Court: I see.

Mr. Clay: Now, once the posture case has altered, we do have to change our posture about it and delve into the causation question.

The Court: What do you have to say about it, Plaintiff?

Mr. McCain: Your honor, it makes no difference as to causation, whether Duke is in the case or out of the case. Duke

caused it and the fact of whether they are a party or a non-party has absolutely no bearing on the question. It's a smoke screen to buy two more months to try to put their main defense together and we argue that their oral request to delay this matter for another two more months should be denied.

I might add that on the plaintiff's motion to dismiss, and of course, Duke consents to it and no other party objects to it, and the ends of justice would be served by letting the parties--the parties don't want to litigate any more at this time, to let them settle their controversy and end that part of it now. As to the causation questions, that's a question that's in the case irregardless of whether Duke is a party or a non-party. It would be a defense available to the Strawcutter, Burleson, Leininger, Mussell Group, whether or not Duke was in the

case or not. And that matter should have been explored in the year and a half to two and a half years that these cases have been pending.

They've got a defense on causation that should have been explored before the matter was set for trial, we argue to you and submit to the court that that is simply not a good reason to further delay this matter and the request should be denied in all fairness to all parties.

Mr. Harris: May I be heard just a moment?

The Court: Yes, Sir.

Mr. Harris: On behalf of Southeastern General Hospital, I'd like to join in the request that we be given additional time.

Mr. McCain may be right, but this is a very serious and very important case. And it certainly does change the postulate case as to whether or not the

plaintiff is attempting to prosecute the Duke Hospital and/or Duke doctors and whether or not we are in a position to carry out tne burden; and I don't know if we can carry it.

But I do know that the matter is of such importance that he ought not to be here objecting when everyone else is here trying to cooperate with him to try to get this matter going, and as far as I know, there's been no delay on anybody's part.

And now, all we're asking for is to come into court and present the case properly. And it may be that we don't need it, but if we do need it, sixty days is going to be a short time in which we have to get ready.

The Court: I'm going to give you time to be heard. Go ahead.

Mr. McCain: Mr Harris argues that it changes the posture of the case. I

think certainly everybody I see to my left that has been involved with the case are very able and very experienced lawyers in the defense of these type cases.

All of us are aware that the posture of the cases can change from time to time by the granting of summary judgments, by voluntary dismissal, by directed verdicts given by the trial judge at the time of trial, and it's encumbant on all of us to prepare our client's case at the time that the court gives us the opportunity to prepare it. Changing posture of the case simply is not a good reason. There is no substance to that request.

It was said that they cooperated in getting it to trial with them. This case was set for trial in December, and I understand counsel for the Strawcutter, Leininger, Burleson group

requested and received a continuance for the trial setting. It's now March, now, and the trial was set for latter April. Another two month continuance would effectively mean another six to eight months down the road before this matter can be finally concluded in a very serious matter.

We're all able in this case. We've all had a chance to prepare our case and our defenses for trial. It's been set once for trial and a continuance was granted from that session. And we contend very strongly that the matter ought to proceed for trial.

The Court: Who represents Duke?

Mr. Bryson: If it please the Court, I'm Ed Bryson from Durham. I appear on behalf of Duke, Dr. Moran and Dr. Paulson. And would have appeared on behalf of Dr. Serva, but he was never served; he is out of the country.

But I would just like to advise the Court, not to take up too much of the court's time, but sometime ago around Christmas, I don't know when, Sir, I was advised by Mr. McCain on behalf of the plaintiffs that they would like to take a voluntary dismissal under Rule 41 as to my clients. I advised my clients of Mr. McCain's request and they instructed me to consent to it. I believe the file might reflect, I'm not quite sure what was filed with the Court, in fact, but I did sign a consent by order or motion. I can't remember the exact item.

Mr. Rountree: Both.

Mr. Bryson: I think it was on the 20th of this past month that his honor signed an order dismissing it as to my clients and then shortly thereafter, six days or so I believe it was, Mr. Harris, on behalf of Southeastern General Hospital

moved that the order be rescinded, and of course, his honor rescinded it based on an objection by one of the parties. We're still here ready to -- my client's have instructed me to be here and asked the Court allow the plaintiff's dismissal which I'm here. I don't have any argument to make, but if your honor--because we've got two lawsuits involved, one in 1980 lawsuit in which I appear, along with Mr. Harris and Dr. Williamson who Mr. Blount represents and I understand that Mr. Blount is here and has filed with the Court a motion for summary judgment to be heard today. And it's my understanding that there's no opposition to it. So, as far as the lawsuit, the one lawsuit, although I know it's not indicated, no consolidation, apparently there's no opposition to it. And I understand the rule is not an absolute rule when the plaintiff

requests it, but it's discretionary with the court; and I know his honor knows more about this than I, but again, I've been instructed to appear, and hopefully the Court will allow the dismissal as to my clients.

The Court: Well, The Court would observe the way the thing got signed, it's probably a little bit premature on my part. I'm new to it. I've just got here-- I've only been here about ten months and I'm sort of used to things being done the way that they're done in the State Court, and I really didn't pay that much attention to it. I came here and the parties had consented to it and I signed it. And upon it being brought to my attention and reading the rules 1, frankly, realized I shouldn't have done it, and that's the reason I'm giving you the opportunity today to be heard on the matter, and to decide whether I'm

going to approve dismissal in the 41-B or not.

I'll take full responsibility for the improvident interval and we'll just move on from that point.

Mr. Rountree: Judge, I think it would be appropriate for me maybe to introduce all the people involved here for the court reporter.

I'm George Rountree from Wilmington; with me is Grover C. McCain, Jr., as one of other attorneys in this lawsuit. On his left, of course, is Mr. Bryson. On his left is Mr. Harris--W. C. Harris, Jr. of the Raleigh Bar. Mr. Clay--Robert Clay; W. Osborne Lee of the Robeson County Bar; and James Blount of the Smith-Anderson firm of the Raleigh Bar. And I hope that takes care of your needs, young lady.

When it comes time for the Court to hear further on Mr. Clay's oral motion to

continue the case, I would like to be heard on it, because of --

The Court: (Interposing) You better speak while you're standing up. You might not get a chance again.

Mr. Rountree: As far as I know, except for Mr. Blount and Mr. Bryson--

Well, Mr. Blount, Mr. Lee, Mr. Harris, Mr. Bryson and I have been in this case since the inception of the case.

At the time the second case against the Duke defendants and the Southeastern General Hospital was filed, there was an order entered consolidating the cases. One or more of the defendants violently objected to that; and there was a hearing before Judge Dupree to determine the propriety of the order earlier entered by Judge Larkins.

At that hearing, the defendants Strawcutter, Burleson and Leininger announced in open court they were ready for trial.

That was difficult for me to believe because of the time involved. However, it was a judicial proclamation by those defendant;

Secondly. Duke objected to the joinder. As I recall, the other parties objected to the joinder. And-- Well, that's not quite because Mr. Harris is not there. No one representing Southeastern General Hosptial appeared.

And in fact, from the time that Judge Dupree entered his order, in effect continuing the consolidation pending further determination by the Court, the Court should deem it appropriate to continue the consolidation until the case was set for trial by this Court the 6th of April and then subsequently the 27th, there have been a number of depositions taken and a number of pre-trial discovery efforts with the exception of interrogatories filed and served on behalf of

Duke, the defendants Strawcutter, Burleson and Leininger and the defendant Southeastern General Hospital, to my knowledge, did not avail themselves of any discovery. No cross claim was filed by any of the defendants in any of the actions against any of the other defendants. Now, I discussed that with some of the defendants on occasion and for whatever reason, they have declined to do that.

Obviously, the rules envisioned defendants filing cross claims against each other, that's why there's a Rule 15. In any event, the defendants have determined to proceed without doing any discovery and without doing anything to prepare the cases against anybody as the plaintiff sees it until this case was set for trial. At that point, they are now scattering around trying to determine what they are going to do.

This is another effort as the plaintiff sees it to delay disposition of the case that has been pending in this district, at least the first version, for some years, since 1977.

The plaintiff represents his incompetent son the boy is languishing in a room specially built for him in his father's house, his mother's house in Atlanta, South Carolina and has run out of money. The boy requires around the clock nursing care, I was there on Friday.

It seems to me sir that the equities of the situation weigh with respect to rapid trial, weigh very heavily in favor of the plaintiff.

The defendants moved, as Mr. McCain pointed out, as soon as they received notice of the Janaury 26th, original setting of this trial, they moved for a continuance, which was granted by

Judge Dupree.

And the defendants have been aware for at least nine months, to my knowledge, that the plaintiff has been pressing for trial. And there's been no secret about it, we've told the defendants that we would make our witnesses available for their examination. Nobody wanted to do that. Nobody has availed themself of that opportunity.

And we think at this stage of things they should not be given any further opportunity to delay this particular case.

Mr. Lee: If it please the Court

The Court: Yes, Sir, Mr. Lee.

Mr. Lee: My name is Osborne Lee. I represent individually the Strawcutter, Burleson and Leininger. The case first came against those three individuals, and that's the case, your honor, filed in 1977. That case has been pursued very diligently with more affidavits and more

depositions than I have ever taken in my entire law practice. That case alone occupies two lose beams (phonic) boxes in my office.

The other case was filed after we made a statement and we were the parties that opposed the consolidation because we opposed it on the stated grounds before Judge Dupree. And if your honor remembers, there was an order signed without a hearing before Judge Larkins and we moved to set the order aside and Judge Dupree left the order intact and obligated the Court to consider the matter at a later date somewhat.

But at that particular juncture, that was a very important juncture at least to the defendants Strawcutter, Burleson and Leininger because up to that point, we had been dealing in urology and urological matters. Now, all of the stated contentions were dealing in urology.

Now, at that time, Rountree very eloquently introduced a participant in the trial, Mr. Bill Moore of the Georgia Bar as a doctor, or medically oriented. And he proceeded to state the theory of the case was one continuun of action. And I'd hardly used that word in breakfast time conversation in Robeson County before, but we found out that one continuum of action meant that the man had been suffering all along from something other than urological and that urology was not the problem or at least the contention for which he is ultimately suffering. That is, there's some red thing called--and I'm as good at pronouncing medical words as I am some other things, Judge-- but Anoxia (phonic); and all it was, he had a bad count of oxygen, nitrogen and all that good stuff in there.

And at that time, the depositions were

continued to be taken. And Dr. Paulson, the chief witness at Duke, two previous depositions, and the defendants had never even cross-examined him. Then it was set up a couple of times and they were able to complete that.

And so, with Duke out of it, your honor, we've got a completely different set of rules. We're playing a different ballgame because of their statements both on the record as to the negligence of Duke and the contended causes of his incompetancy now.

And you may be assured, your honor, he says that we have not done any discovery, but I would beg to differ that Mr. Broadfoot, myself, Mr. Blount, Mr. Harris, and now Mr. Clay have been very diligent in trying discovery of one sort or another, but with Duke out of there, we nave a whole new facet in order to define, because they are now put in the posture

of not being a joint defendant, nor can we use their witnesses in the same fashion we could have used them before, but we have to go back and find some other people at Duke: Dr. Seeker or Seiker; Dr. Over, a radiologist, and others that we would have to find in order to support belief.

But we believe even if you gave us a protective order, with that, plus the sixty days, we would have to spend the entire time preparing for the case, and we did not make this in order to be dilatory to the Court, your honor.

The Court: Mr. Blount, I take it your main interest here is on your motion for summary judgment?

Mr. Blount: Yes, sir.

The Court: Somebody said that counsel for plaintiff did not resist that motion, is that correct?

Mr. McCain: We don't consent to it, your

honor, but we don't have any arguments.

The Court: I didn't say that you consented, I said, don't resist.

Mr. Blount: They had indicated they would not resist anything that occurred today. So, if we're going to get out, we don't have the expense and time in continuing in pre-trial and discovery after this.

The Court: Well, if anybody wants to be heard--Do they waive? Counsel, I take it then that you waive any time requirements of the motion being filed on you?

Mr. McCain: Certainly do, your honor.

The Court: All right. Motion by the defendant Warren Williamson for summary judgment is allowed.

The motion by plaintiff and defendant Duke University Medical Center for a voluntary dismissal pursuant to Rule 41-A(2) of the Rules of Civil Procedure is denied and the case be set for trial

on April the--Jury selection on April the 6th and trial on April the 27th...

APPENDIX D

AMENDED ORDER FOR INVOLUNTARY DISMISSAL

THIS CAUSE coming on to be heard before the undersigned Judge Presiding on the 7th day of April, 1981, upon oral motion made by counsel to the Defendants, Duke University, David F. Paulson and Michael J. Moran for entry by the Court for an Order For Involuntary Dismissal pursuant to Rule 41(b), Rules of Civil Procedure, dismissing the action of Plaintiff as against said moving Defendants for reason of: 1) a failure of Plaintiff to prosecute this action as against the aforenamed Defendants, and 2) a failure of Plaintiff to comply with the rules of this Court, the specific grounds in support thereof being advanced in oral

argument by counsel to said Defendants-Movants and being set forth in particular in the written Motion For Involuntary Dismissal filed by said Defendants-Movants on the 8th day of April, 1981, in supplement to said oral motion;

And plaintiff, through counsel, having voiced his objection to the Defendants' Motion in open Court and having set forth the particular grounds for his objection in the written Response to Motion for Involuntary Dismissal filed herein;

And the Court, after a) review of the record proper in this civil action, b) hearing argument of counsel for said Defendants-Movants, c) having made inquiry of counsel to Plaintiff-Respondent as to the position of Plaintiff in response to said Motion For Involuntary Dismissal and being advised by said counsel to Plaintiff to the effect that

Plaintiff could interpose no objection or responsive argument in opposition to said Motion For Involuntary Dismissal, and d) being fully advised in the premises, being of the opinion that said Motion For Involuntary Dismissal should be allowed, it is

ORDERED AND ADJUDGED that the Motion For Involuntary Dismissal pursuant to Rule 41(b), Rules of Civil Procedure, as made by the Defendants, Duke University, David F. Paulson and Michael J. Moran, be and the same is herewith allowed.

This is the 5th day of May, 1981.

/s/ W. Earl Britt
United States District Judge

APPENDIX E

MOTION UNDER RULE 41

NOW COMES the plaintiff, through counsel, and hereby moves the Court pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure dismissing from this action without prejudice defendants Duke Univeristy (denominated in the complaint as Duke University, Inc., Duke University Medical Center and Duke Hospital), David F. Paulson, Luis Gonzalez-Serva and Michael J. Moran with leave granted to any properly appointed personal representative or guardian of Samuel Clyde Morrell to refile this action as to these defendants in a North Carolina state court having proper jurisdiction within one year from the date of this dismissal notwithstanding any statutes of limitations.

This 22nd day of January, 1981.

Rountree & Seagle

By:

/s/ George Rountree, III

Attorney for Plaintiff

McCain & Moore

By:

/s/ Grover C. McCain, Jr.

Attorney for Plaintiff

APPENDIX F

CONSENT TO GRANTING OF MOTION

NOW COME defendants Duke University (denominated in the complaint as Duke University, Inc., Duke University Medical Center and Duke Hospital), David F. Paulson and Michael J. Moran, through counsel, and hereby consent to the granting to the above motion by the Court. That defendant denominated as Luis Gonzalez-Serva has never been served with process in this action and counsel for the other defendants does

not represent Luis Gonzalez-Serva. However, counsel for the other named defendants does not take any position with regard to the granting of plaintiff's motion regarding Luis Gonzalez-Serva.

This 22nd day of January, 1981.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon

By:

/s/ E. C. Bryson, Jr.

Attorneys for Defendants Duke University, David F. Paulson and Michael J. Moran

APPENDIX G

ORDER OF DISMISSAL WITHOUT PREJUDICE

IT APPEARING from the consent of counsel for Duke and Drs. Paulson and Moran that this action ought to be dismissed as to them without prejudice and with leave to reinstitute the claims in State Court in North Carolina within

one (1) year of the entry of this order;

NOW, THEREFORE, IT IS ORDERED that the claims of the Plaintiff in this action insofar as they pertain to the Defendants, Duke University, Inc., Duke University Medical Center, Duke Hospital, David F. Paulson, M.D., and Michael J. Moran, M.D., be and they hereby are dismissed without prejudice and with specific leave granted to any properly appointed person, representative or guardian of Samuel Clyde Morrell, Incompetent, to refile this action as to any one or all of these Defendants in a North Carolina State Court having proper jurisdiction within one year from the date of this dismissal, notwithstanding any statutes of limitation.

Done in Wilmington, North Carolina, this 20th day of February, 1981.

/s/ W. Earl Britt

United States District Judge

APPENDIX H

OBJECTION TO MOTION UNDER RULE 41

NOW COMES the defendant, Southeastern General Hospital, Inc., in response to plaintiff's motion pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure to dismiss from this action without prejudice defendants Duke University (denominated in the complaint as Duke University, Inc., Duke University Medical Center and Duke Hospital), David F. Paulson, M.D. Luis Gonzalez-Serva, M.D., and Michael J. Moran, M.D.

Defendant Southeastern General Hospital objects to the dismissal of the above named co-defendants on the ground that their joinder as parties is necessary to a complete and fair adjudication of plaintiff's claims for professional malpractice. Further, in the event the Court orders dismissal of the

above named parties as co-defendants, defendant Southeastern General Hospital will move for joinder of said persons and institution as third party defendants pursuant to Rule 14(a) of the Federal Rules of Civil Procedure.

This the 26 day of February, 1981.

Harris, Cheshire, Leager & Southern

By:

/s/ W. C. Harris, Jr.

Attorneys for Defendant Southeastern General Hospital

APPENDIX I

ORDER

The Court's Order of 20 February 1981 dismissing this action without prejudice as to Defendants Duke University, Inc.; Duke University Medical Center; Duke Hospital; David F. Paulson, M.D. and Michael J. Moran, M.D. is hereby rescinded. All parties

shall have an opportunity to be heard before the matter is considered further.

SO ORDERED.

This 3 March, 1981.

/s/W. Earl Britt

U.S. District Judge

APPENDIX J

MEMORANDUM AND RESPONSE

NOW COMES the defendant, Southeastern General Hospital, Inc., through counsel, and hereby responds to motion of plaintiff to voluntarily dismiss without prejudice defendants Duke University, Inc., Duke University Medical Center, Duke Hospital, David F. Paulson, M.D., and Michael J. Moran, M.D.

In ruling on motion of plaintiffs to voluntarily dismiss without prejudice, those factors to be considered by the Court include the sufficiency of an explanation for the need to take a

dismissal. Thomas v. Amerada Hess Corp. D.C. Pa. 1975, 393 F. Supp. 58, 70. The essential question before the Court is whether dismissal of those parties will be unduly prejudicial to the remaining defendants. Nance v. Jackson D.C. Ala. 1972, 56 F.R.D. 463.

The plaintiff filed two actions which have been consolidated for trial; the first action in 1978 against Drs. Strawcutter, Burleson and Leininger, individually and as partners doing business as UROLOGY CLINIC; and the second action filed in 1979 against the defendants which plaintiff now seeks to voluntarily dismiss, and this defendant and Dr. Williamson.

In preparing the defense for Southeastern General Hospital, Inc. we considered the allegations of negligence against each of the other defendants in both cases. It appeared that there was

a continuing series of alleged negligent acts which resulted in the alleged injury, that it would be prejudicial to all defendants to try this case link by link, and the jury would have a better opportunity to render a fair verdict if the entire chain of events was placed before them.

Upon further reflection, we cannot contend our client will be prejudiced if said defendants are dismissed by the Court. It now appears to us that it is appropriate for our client to be heard along with and at the same time as the defendants in the 1978 action since these parties attended to the plaintiff at the same place and time.

I respectfully request that my objection to dismissal of defendants be withdrawn, and I apologize if my actions have inconvenienced the Court or counsel.

This 5 March 1981.

Respectfully,

/s/ W. C. Harris, Jr.

Attorney for Southeastern General Hospital, Inc.

APPENDIX K

RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ITS RULE 41(a)(2) MOTION

Duke University, David F. Paulson, M.D. and Michael J. Moran, M.D. by and through counsel as a Response to plaintiff's Motion For Reconsideration of its previous motion filed pursuant to Rule 41(a)(2) request this Honorable Court to enter an order granting plaintiff's motion for a voluntary dismissal without prejudice as per the conditions set forth in the consent to the granting of said motion previously filed with this Court.

In Le Compte v. Mr. Chip, Inc., 528 F2d 601 (C.A. 5th, 1976) it is

written:

> "When considering a dismissal without prejudice, the court should keep in mind the interests of the defendant for it is his position which should be protected. 9 Wright & Miller, Federal Practice & Procedure: Civil §§2362,2364, at 149, 165 (1971). Nevertheless, in most cases a dismissal should be granted unless the defendant will suffer some legal harm. (citing authorities)..."

In the case at bar the parties who would be dismissed without prejudice if the motion is granted would be the only parties "harmed" and Duke University, Dr. Paulson and Dr. Moran have no objection to said motion being granted, and in fact continue to consent to the granting of said motion.

It should be brought to the attention of the Court that in Morrell v. Strawcutter (78-0009-Civ-3) a number of depositions were taken prior to the filing of Morrell v. Duke (79-0076-Civ-3). To possibly allow the use of those

depositions as against some of the parties could possibly work to the prejudice of the remaining parties who were not parties to plaintiff's claims at the time of the taking of said depositions and did not have the right to examine the witnesses. In addition to insist that plaintiff prosecute its alleged claims against Duke University, Dr. Paulson and Dr. Moran even though plaintiff desires to dismiss these parties would lengthen considerably the trial and create unnecessarily a great expense and inconvenience to Duke University, Dr. Paulson and Dr. Moran.

It is respectfully submitted and urged that this Honorable Court grant plaintiff's motion for voluntary dismissal pursuant to Rule 41(a)(2).

This the 26th day of March, 1981.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon

By:

/s/ E. C. Bryson, Jr.

Attorneys for Duke University;

David F. Paulson, M.D.; and

Michael J. Moran, M.D.

CERTIFICATE OF SERVICE

The undersigned herewith certifies that he has this day served Petition for a Writ of Certiorari upon each of the attorneys of record of Respondent by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to each of said attorneys at their respective last known mailing addresses, they being:

Josiah S. Murray, III
Newsom, Graham, Hedrick,
Murray, Bryson & Kennon
Attorney at Law
P. O. Box 2088
Durham, North Carolina 27702

W. Osborne Lee
Lee & Lee
Attorney at Law
407 North Elm Street
Lumberton, North Carolina 28358

Hal W. Broadfoot
Anderson, Broadfoot & Anderson
Attorney at Law
P. O. Box 474
Fayetteville, North Carolina 28302

Robert M. Clay
Johnson, Patterson, Dilthey & Clay
Attorney at Law
P. O. Box 310
Raleigh, North Carolina 27602

This 24 day of September, 1982.

Grover C. McCain, Jr.
Counsel of Record
McCAIN, ESSEN & ORCUTT
100-E Franklin Square
1829 E. Franklin Street
Chapel Hill, NC 27514
(919) 967-0811

Office-Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-534

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

SAMUEL CLYDE MORRELL,
an Incompetent Person,
by his COMMITTEE,
HENRY CLYDE MORRELL,

Petitioner,

v.

DUKE UNIVERSITY, et al.,

Respondents.

-and-

SAMUEL CLYDE MORRELL,
an Incompetent Person,
by his COMMITTEE,
HENRY CLYDE MORRELL,

Petitioner,

v.

DR. HOWARD E. STRAWCUTTER, et al.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Josiah S. Murray, III
Counsel of Record
NEWSOM, GRAHAM, HEDRICK,
MURRAY, BRYSON, KENNON
& FAISON
Post Office Box 2088
Durham, North Carolina 27702
(919) 682-5671

Robert M. Clay
Counsel of Record
PATTERSON, DILTHEY,
CLAY, CRANFILL,
SUMNER & HARTZOG
Post Office Box 310
Raleigh, North Carolina
27602
(919) 821-7052

TABLE OF CONTENTS

LIST OF PARTIES TO THE PROCEEDING

TABLE OF CASES AND AUTHORITIES

OPINION BELOW

RULES OF CIVIL PROCEDURE INVOLVED

SUMMARY OF REASONS FOR DENYING THE PETITION

DISCUSSION OF REASONS FOR DENYING THE PETITION

CONCLUSION

TABLE OF APPENDICES

APPENDICES

LIST OF PARTIES TO THE PROCEEDING

Samuel Clyde Morrell, an incompetent person, is represented in this action by his Committee, Henry Clyde Morrell.

Duke University, a North Carolina Corporation, David F. Paulson, M.D. and Michael J. Moran, M.D. are herein sometimes referred to as the "Duke defendants." Duke University Medical Center and Duke Hospital have no independent corporate existence. Duke University does not have a parent company nor does it have any subsidiary or affiliate; a Disclosure Of Corporate Affiliations And Financial Interest was executed and filed of record in the United States Court Of Appeals for The Fourth Circiut pursuant to Local Rule 17 of the United States Court Of Appeals For The Fourth Circuit to which document reference is hereby made as permitted by Rule 28, Rules Of Supreme Court Of The United States.

Luis Gonzales-Serva, M.D. is named as a party defendant, but was never served with process in this action.

Southeastern General Hospital, Inc. is a North Carolina corporation. A settlement between Southeastern General Hospital and the Plaintiff was effected and an Order entered dismissing this action as to Southeastern General Hospital, Inc.

Warren L. Williamson, M.D. was dismissed from this action by entry of Summary Judgment in his favor.

Dr. Howard E. Strawcutter, Dr. William R. Burleson and Dr. Thomas R. Leininger, individually and as partners doing business under the common name of Urology Clinic, are herein sometimes referred to as the "Strawcutter defendants."

The Duke defendants and the Strawcutter defendants appear as Respondents to the Petition for a Writ of Certiorari.

TABLE OF CASES AND AUTHORITIES

CASES

Adickes v. Kress & Co., 398 U.S. 144 (1970).

Blue Mountain Construction Co. v. Werner, 270 F.2d 305 (9th cir. 1959), cert. denied, 361 U.S. 931 (1960).

Duigan v. United States, 274 U.S. 195 (1927).

Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d cir. 1953), cert. denied, 345 U.S. 964 (1953).

Husty v. United States, 282 U.S. 694 (1931).

Lawn v. United States, 355 U.S. 339 (1958).

Link v. Wabash R. Co., 370 U.S. 626 (1972).

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951).

United States v. Johnston, 268 U.S. 220 (1925).

Young v. Wilky Carrier Corp., 150 F.2d 764 (3d cir. 1945), cert. denied, 326 U.S. 786.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit has not been reported. It is reprinted as Appendix A to the Petition for a Writ of Certiorari.

No written Opinion was rendered in this cause by the United States District Court for the Eastern District of North Carolina.

RULES OF CIVIL PROCEDURE INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE

Rule 41(a)(1)(ii)

Rule 41(a)(2)

Rule 41(b)

Rule 51

RULES OF PRACTICE AND PROCEDURE IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Rule 26.06 (set out verbatim in Appendix E annexed hereto)

The text of Rule 41 of the Federal Rules of Civil Procedure, subsections (a) and (b), appears at pages 2-4 of the Petition. The text of Rule 51 of the Federal Rules of Civil Procedure appears at page 4 of the Petition.

SUMMARY OF REASONS FOR DENYING THE PETITION

I. ISSUES ARISING UNDER RULE 41

1. The decision in this appeal by the United States Court of Appeals for the Fourth Circuit is not in conflict with the decision of another Federal Court of Appeals on the same matter.

A. The question whether Rules 41(a)(1)(ii) and 41(a)(2) permit a plaintiff to take a voluntary dismissal against less than all of several defendants was not addressed by the Court of Appeals below.

B. The decision of the Fourth Circuit Court of Appeals to the effect that a District Court is not obliged to treat a Rule 41(a)(2) Motion for voluntary dismissal as a Rule 41(a)(1)(ii) stipulation for dismissal is not in conflict with a decision of another federal court of appeals on the same matter.

2. The Court of Appeals did not depart from the accepted and usual course of

judicial proceedings in affirming the District Court's allowance of the Duke defendants' motion for involuntary dismissal under Rule 41(b).

3. Review by Writ of Certiorari is unwarranted with respect to the issues presented under Rule 41 of the Rules of Civil Procedure upon the additional grounds that the questions presented by the Petition were correctly analysed and decided by the Court of Appeals, that the questions of Federal Law are not so important as to require resolution by the Supreme Court, and that the unusual factual background of this case makes it unlikely that similar issues will recur.

II. ISSUES ARISING UNDER RULE 51

1. The Fourth Circuit Court of Appeals gave full consideration to this issue and its decision is legally sound.

2. The issue is unlikely to recur and is too narrow to warrant review by this Court on certiorari.

* * *

DISCUSSION OF REASONS FOR DENYING THE PETITION

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WITH RESPECT TO THE ISSUES ARISING UNDER RULE 41 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

1. The decision in this appeal by the Court of Appeals for the Fourth Circuit

is not in conflict with the decision of another federal court of appeals on the same matter.

A. The question whether F.R.Civ. P. 41(a)(1)(ii) and 41(a)(2) permit a plaintiff to take a voluntary dismissal against less then all of several defendants was not addressed by the Court of Appeals below.

The issues presented to the Fourth Circuit Court of Appeals by Petitioner (Appellant below) regarding the District Court's denial of Petitioner's Rule 41(a) Motion for voluntary dismissal were two-fold. Firstly, Petitioner argued that the District Court should have treated his Motion which was consented to by the Duke defendants as a stipulation of dismissal under Rule 41(a)(1)(ii) rather than as a motion for dismissal under Rule 41(a)(2) as Petitioner himself had presented such. This position was never taken by Petitioner before the District Court. Indeed, Peti-

tioner sought and obtained reconsideration of his motion before the District Court, and at no time prior to taking appeal did he ever, to these Respondents' knowledge, assert that his Rule 41(a)(2) motion was anything other than a motion seeking an Order from the Court. Secondly, Petitioner argued before the Court of Appeals for the Fourth Circuit that the District Court abused its discretion in failing to allow Petitioner's Rule 41(a)(2) motion for voluntary dismissal. (See Appendix A appended hereto.)

The Court of Appeals addressed Petitioner's first argument by observing that - while it may have been permissible for the District Court to treat the Rule 41(a)(2) motion as a Rule 41(a)(1)(ii) stipulation - the Court was not obliged to do so. (Appendix A to Petition for Writ of Certiorari at page 56.) Petitioner's second

argument - that the District Court abused its discretion in denying the Rule 41(a)(2) motion - was considered and rejected by the Court of Appeals. (Appendix A to Petition for Writ of Certiorari at pages 56-63.)

From these rulings of the Court of Appeals Petitioner distills and seeks to advance before this Court the argument that the Fourth Circuit Court of Appeals has adopted a reading of Rule 41(a) that conflicts with decisions of other federal courts of appeal. The argument is premised on the contention that the Fourth Circuit has followed, sub silentio, the decision of the Second Circuit in Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953), cert. denied, 345 U.S. 964 (1953), and that the Harvey Aluminum case conflicts with a decision in the Third Circuit (citing Young v. Wilky Carrier Corp., 150 F.2d 764 (3d Cir. 1945), cert.

denied, 326 U.S. 786.)

Based upon this perceived conflict between two federal courts of appeals, Petitioner then argues that the Supreme Court of the United States must decide the question whether Rule 41(a) permits a court to order dismissal of fewer than all defendants to a multi-party action at the instance of the plaintiff. (Petition for Writ of Certiorari at i).

A careful reading of the unpublished opinion of the Court of Appeals in this case reveals, however, that the court did not decide the question presented by the Petition. Without attempting to analyse the issue of whether Rule 41(a) permits a plaintiff to dismiss some but not all defendants, the Court of Appeals assumed, arguendo, that such action would be permissible but found that the District Court did not abuse its discretion in failing to

grant Petitioner's motion in the present case. (Appendix A to Petition for Writ of Certiorari at pages 56-63).

Petitioner's contention that the Fourth Circuit has now adopted the Harvey Aluminum rule is without foundation in the opinion rendered by the Court of Appeals. Nowhere is there any reference to the differing opinions among the circuits with respect to the meaning of the word "action" as such appears in Rule 41(a) nor did the Court of Appeals indicate that it deemed it necessary in this case to resolve the question for the Fourth Circuit. The issue simply was never addressed by the Court of Appeals and a resolution of the issue was unnecessary to the Court's decision.

Respondents concede that there is a dichotomy in the decisional law with respect to the question of whether the dismissal of an "action" under Rule 41(a) may

be limited to claims or causes of action against one of several defendants. It is respectfully submitted, however, that this question was not decided by the Court of Appeals for the Fourth Circuit in the present appeal, and therefore it is neither necessary nor appropriate for the Supreme Court to resolve the issue through review of the instant case. Adickes v. Kress & Co., 398 U.S. 144 (1970); Lawn v. United States, 355 U.S. 339 (1958); Husty v. United States, 282 U.S. 694 (1931); Duigan v. United States, 274 U.S. 195 (1927).

B. The decision of the Fourth Circuit Court of Appeals to the effect that a District Court is not obliged to treat a Rule 41(a)(2) motion for voluntary dismissal as a Rule 41(a)(1)(ii) stipulation for dismissal is not in conflict with a decision of another federal court of appeals on the same matter.

Petitioner argues in his Petition to the Supreme Court of the United States that the District Court "vetoed" a stipulation for dismissal between Petitioner and the Duke defendants in failing to treat Petitioner's Rule 41(a)(2) Motion for voluntary dismissal as a stipulation of dismissal under Rule 41(a)(1)(ii). Petitioner further argues that the Court of Appeals' failure to reverse the District Court on this issue constitutes a decision which conflicts with decisions in other federal circuits. (Petition for Writ of Certiorari at pages 25-33.)

Petitioner urges that the Supreme Court must decide in this case whether several defendants - but not all defendants - may be dismissed from a multi-party lawsuit on the basis of a stipulation between the plaintiff and those defendants whose dismissal is sought without the

active consent of the additional parties. Yet the facts of the present case and the issues presented to the Court of Appeals do not appear to frame this question for review.

Again, turning to the "Issues Presented" by Petitioner to the Court of Appeals, Petitioner posed the question whether the motion to dismiss and the Duke defendants' consent thereto resulted in an automatic dismissal effective without Order of the court. (See Appendix A appended hereto). In response to this question, the Court of Appeals held that while a court may have the authority under the Rules of Civil Procedure to "unmask" a stipulation "masquerading as a Rule 41(a)(2) motion," it is by no means obliged to do so. (Appendix A to Petition for Writ of Certiorari at page 56.) Indeed, at no time prior to the taking of appeal did the Plaintiff-

Petitioner ever request the District Court to treat the motion as a stipulation.

Thus the question of whether a District Court may "veto" a Rule 41(a) (1)(ii) stipulation of dismissal of less than all parties is not presented for review on the record of this case. The question was not resolved by the Court of Appeals and indeed it was unnecessary that the Court of Appeals do so.

The contention of Petitioner that the Court of Appeals for the Fourth Circuit decided that a District Court may "veto" such a stipulation of dismissal and that the decision is thus in conflict with decisions of other federal courts of appeal is without merit, such having no support in the record on appeal or in the opinion of the Court of Appeals. Because the question was neither presented to nor decided by the Court of Appeals below, it is neither

necessary nor appropriate that the Supreme Court address the question by way of review on writ of certiorari. See, e.g., Adickes v. Kress & Co., 398 U.S. 144 (1970) supra, and cases cited therein.

2. The Court of Appeals did not depart from the accepted and usual course of judicial proceedings in affirming the District Court's allowance of the Duke defendants' Motion for involuntary dismissal under Rule 41(b).

Having failed to prevail in the Court of Appeals upon the argument that the District Court abused its discretion in allowing a motion for involuntary dismissal under Rule 41(b) (Appendix A appended hereto), Petitioner now asserts that the District Court deviated from the normal course of judicial proceedings in allowing the motion and that this departure was sanctioned by the Court of Appeals. (Petition for Writ of Certiorari at pages 34-39.)

It is difficult for Respondents to

grasp the basis upon which the Supreme Court is asked to exercise its supervisory powers over the lower federal courts for the purpose of reversing the District Court and the Court of Appeals on the record now before the Court. The procedure followed in this case was in accordance with the Rules of Civil Procedure. Respondents' Motion [for an involuntary dismissal with prejudice] was based upon Petitioner's representation, under oath, that "Plaintiff has presently no testimony prepared to present against the Duke Defendants", that "Plaintiff is not at this time desirous of presenting a case against the Duke Defendants", and that "We [Plaintiff] are in the anomalous position of having defendants against whom we, at this time, do not wish to litigate in the case". (Appendices B and C appended hereto.) The Motion under Rule 41(b) was made in open Court at the

time the case was called for commencement of jury selection - such being the day after receipt by Respondents of the representation that Plaintiff did not wish to present a case against the Duke defendants (belatedly filed with the Court by way of Plaintiff's Answers to Interrogatories) and a substantial period of time after the District Court had denied Plaintiff's Motion for voluntary dismissal under Rule 41(a)(2). Respondents can only submit that the procedure followed by Respondents in presenting the Motion for involuntary dismissal was in all respects correct and proper and did not in any manner depart from the accepted and usual course of judicial proceedings as established by the Rules of Civil Procedure.

As the Motion for involuntary dismissal was properly brought before the District Court, it was in accordance with

the accepted and usual course of judicial proceedings that the District Court should issue a ruling upon the Motion after hearing argument of counsel. This the Court did. (Appendix B appended hereto.) Upon being requested by the District Court to respond to the Duke Defendants' Motion and the argument of their counsel in support thereof, counsel for Plaintiff stated that

> the Plaintiff feels that the defense [defendants'] position of [on] the [Rule] 41(b) motion is totally accurate if you deny a [Rule] 41(a)(2) motion which you've done. . . . I see no alternative for the Court but to dismiss involuntarily. . . . [O]ur position on the record, obviously, cannot be recanted and Duke wins on this motion as I see it. . . . [T]he Plaintiff objects to Duke getting out with prejudice in the final analysis. We don't think that's what should be done. And I'm going to state on the record before your Honor now the 41(a)(2) motion having been denied and [in] the interest [of] having our record, we have nothing to offer to counter their motion for involuntary dismissal.

(Appendix B appended hereto.)

It cannot be gainsaid that the federal trial court has the authority to dismiss a plaintiff's action with prejudice because of his failure to prosecute. Link v. Wabash R. Co., 370 U.S. 626 (1972). What constitutes a "failure to prosecute" depends on the facts of the particular case. The issue presented upon allowance of such a Motion is whether the Court abused its discretion. Id. This question has been presented to the Court of Appeals for the Fourth Circuit based on the circumstances of the present case and answered by that Court in the negative. (Appendix A to Petition for Writ of Certiorari at pages 61-62.)

The Motion for involuntary dismissal having been properly brought before the District Court and ruled upon by that Court, and no abuse of discretion having

been found in the Court's ruling thereon by the Court of Appeals for the Fourth Circuit, the record before the Supreme Court is barren of any ground to substantiate the contention that the Court of Appeals departed from the accepted and usual course of judicial proceedings in deciding this appeal. It is thus submitted that Petitioner's argument affords no basis for the exercise of the supervisory powers of the Supreme Court by way of writ of certiorari to the Fourth Circuit Court of Appeals.

3. Review by writ of certiorari is unwarranted with respect to the issues presented under Rule 41 of the Rules of Civil Procedure upon the additional grounds that the questions presented by the Petition were correctly analysed and decided by the Court of Appeals, that the questions of federal law are not so important as to require resolution by the Supreme Court, and that the unusual factual background of this case makes it unlikely that similar issues will recur.

A. The questions presented were correctly analysed and decided by the Court of Appeals.

The issues raised in the Court of Appeals with respect to the District Court's decisions on the Rule 41(a)(2) and 41(b) Motions were threefold: firstly, was the Court obliged to treat the Rule 41(a)(2) Motion and the Duke Defendants' consent thereto as a stipulation for dismissal under Rule 41(a)(1)(ii); secondly, if not, did the Court abuse its discretion in denying the Rule 41(a)(2) Motion; and thirdly, if not, did the Court abuse its discretion in allowing the Rule 41(b) Motion for involuntary dismissal? (See Appendix A appended hereto and Appendix A to Petition for Writ of Certiorari at pages 50-63 and pages 71-73.) It is not open to serious quarrel, Respondents contend, that the Court of Appeals properly recognized the issues and applied the appropriate standard of review. Link v. Wabash R. Co., supra, 370 U.S. 626 (1962); Blue Mountain

Construction Co. v. Werner, 270 F.2d 305 (9th cir. 1959), cert. denied 361 U.S. 931 (1960). The decisions of the District Court upon which review is sought in this case were (and are) matters within the sound discretion of the trial court. This record simply presents no support that the District Court abused its discretion in reaching the decisions it rendered.

B. The questions of federal law properly presented in the present case are not so important as to require resolution by the Supreme Court of the United States.

As Petitioner recognized in the Court of Appeals, the questions appropriately raised for review by denial of Plaintiff's Rule 41(a)(2) Motion and the allowance of the Duke Defendants' Rule 41(b) Motion involve the tandem inquiry of whether the District Court abused its discretion in refusing to dismiss without prejudice and

then dismissing with prejudice. The exercise of trial court discretion within the limits established by this Court is fundamental to the effective operation of the federal judicial system at the District Court level. To seek review by the court of last resort upon every discretionary ruling of a federal trial judge is, however, to frustrate the purpose and meaning of trial court discretion. The proper exercise of discretion is a question previously addressed by this Court and the guidelines for such exercise are well established. Link v. Wabash R. Co., supra. Once such guidelines have been established, it should not be expected that the Supreme Court will review each and every discretionary ruling of the trial courts. The proper exercise of trial court discretion is important, of course, but the proceedings below in the case at bar do not re-

flect such an important question of federal law as to require review by the Supreme Court in this case.

C. The unusual factual background of this case makes it unlikely that similar situations will recur.

Respondents respectfully submit that the circumstances of the present case are so unusual and unlikely to recur that review by the Supreme Court would not provide appreciable guidance to the lower courts in future cases.

The Duke Defendants consented to the terms of Plaintiff's Motion for voluntary dismissal at a time when the only available alternative appeared to be trial on the merits. Only after the Motion for voluntary dismissal was denied did Plaintiff (in response to the Duke Defendants' written Interrogatories) concede by verified statement (verified Answers To Interrogatories)

that Plaintiff was without any evidence to present at trial as against the Duke Defendants. Once this admission had been made on the record, the Duke Defendants on the day following - being the day on which jury selection was to begin - moved orally for an involuntary dismissal under Rule 41(b).

A decision of the Supreme Court under this unusual fact pattern - whether affirming or reversing the decision of the Fourth Circuit Court of Appeals as set forth in its unpublished decision - would be of limited benefit to the lower federal courts. Nor is it necessary that the Supreme Court seek to modify or explain the decisions below in order to avoid the possibility that the decisions of the District Court and the Court of Appeals will establish a precedent in the Fourth Circuit as neither decision has been published.

For the foregoing reasons, it is respectfully submitted that special circumstances do not exist which would make it appropriate for a Writ of Certiorari to be issued by the Supreme Court of the United States in the case at bar.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WITH RESPECT TO THE ISSUE ARISING UNDER RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

1. The Fourth Circuit Court of Appeals gave full consideration to this issue and its decision is legally sound.

As a fourth issue, petitioner argues that the Fourth Circuit Court of Appeals erred in affirming the trial court's deletion of an informed consent portion of the charge to the jury. Respondents submit that the Fourth Circuit decision was correct, and therefore certiorari should be denied.

Rule 26.06 of the local rules of practice and procedure of the United States

District Court for the Eastern District of North Carolina requires that counsel file requests for jury instructions with the Clerk in all jury cases. Rule 51 of the Federal Rules of Civil Procedure also allows the parties to file requests for jury instructions. Pursuant to these rules, petitioner and respondents filed proposed jury instructions with the court, and no informed consent instruction was requested by any party.

The court then prepared its proposed instructions and distributed copies to the attorneys. The court included in its charge the North Carolina pattern jury instructions covering the issue of informed consent, which instructions are cast in terms of obtaining consent to an operative procedure or affirmative treatment.

Respondents objected to that portion of the charge related to informed consent,

arguing that petitioner failed to offer any evidence that the defendant-doctors had rendered a treatment or an operation for which they failed to obtain the petitioner's informed consent. Therefore, respondents argued that the language of the pattern jury instructions on informed consent did not fit the facts of the case and would have been misleading and confusing to the jury. The Court agreed with the respondents' argument and deleted the charge. (See Appendix D appended hereto)

The portion of the charge that the court deleted dealt with a physician's duty to obtain the patient's informed consent to treatment or operation. However, it was petitioner's theory during the trial that the defendant-doctors were negligent in failing to warn the patient and his family of the risks inherent in their decisions to delay treatment and transfer to Duke Medi-

cal Center. Clearly, the petitioner's theory did not fit the pattern jury instructions on obtaining informed consent to operation or treatment. If a special failure to warn instruction was warranted, petitioner had a duty to propose it. Petitioner failed to do so in advance of the charge and failed to offer any additional instructions to the court at the end of the court's charge to the jury. Consequently, the Fourth Circuit Court of Appeals correctly allowed the charge to stand as given, and certiorari should not be granted.

2. The issue is unlikely to recur and is too narrow to warrant review by this Court on certiorari.

The issue raised by petitioner in his fourth reason for certiorari turns on the particular facts of this case alone and is of interest only to the parties involved. The appellate court's decision turned solely upon an analysis of the particular

facts involved and will affect few, if any, other litigants, particularly since the opinion was not published. "Certiorari is granted only in cases involving principles, the settlement of which are of importance to the public as distinguished from the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the courts of appeals." NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 502 (1951). As stated in United States v. Johnston, the Supreme Court "...does not grant a certiorari to review evidence and discuss specific facts." 268 U.S. 220, 227 (1925).

Petitioner is merely asking this Court to make a second review of the trial record to see if it will do what the Fourth Circuit Court of Appeals would not. The rulings of the Fourth Circuit should be and are entitled to great weight, particularly

in view of the fact that the petitioner has failed to cite any legal authority contrary to the appellate court's ruling.

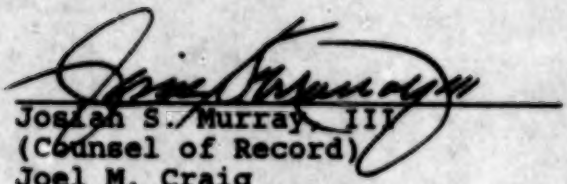
In conclusion, this issue has no overall national importance, and certainly does not involve any conflict of opinion or authority between appellate courts. The Fourth Circuit's opinion will have no impact outside the limits of this case. Therefore, certiorari should be denied.

* * *

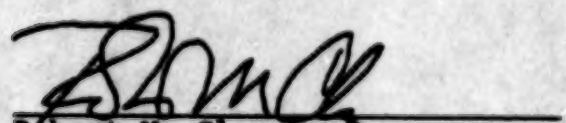
CONCLUSION

For the reasons and upon the authorities herein stated, Respondents respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted this the ____ day of October, 1982.



Josiah S. Murray, III
(Counsel of Record)
Joel M. Craig
FOR THE FIRM: Newsom,
Graham, Hedrick, Murray,
Bryson, Kennon & Faison
Suite 400 - Wachovia Bldg.
Post Office Box 2088
Durham, North Carolina 27702
Telephone: 919/682-5671
Attorneys for Respondents
Duke University



Robert M. Clay
(Counsel of Record)
Alene M. Mercer
Patricia L. Holland
FOR THE FIRM: Patterson,
Dilthey, Clay, Crandell,
Sumner & Hartzog
306 Fayetteville Street Mall
Post Office Box 310
Raleigh, North Carolina
27602-0310
Telephone: 919/821-7052
Attorneys for Respondents
Dr. Howard E. Strawcutter,
et al.

TABLE OF APPENDICES

APPENDIX A: Petitioner's List of Issues Presented on Appeal to the Court of Appeals for the Fourth Circuit

APPENDIX B: Excerpt from hearings before the Honorable W. Earl Britt, United States District Court Judge, Eastern District of North Carolina, on Duke Defendants' (Respondents herein) Motion for Involuntary Dismissal

APPENDIX C: Plaintiff's Answers to Interrogatories propounded by the Duke Defendants (Respondents herein)

APPENDIX D: Bench conference of May 13, 1981, before the Honorable W. Earl Britt, United States District Court Judge, regarding the charge to the Jury.

APPENDIX E: Rule 26.06, Rules of Practice and Procedure in the United States District Court for the Eastern District of North Carolina.

APPENDIX A

STATEMENT OF ISSUES PRESENTED BY PETITIONER ON APPEAL TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

1. When the plaintiff filed a request for a voluntary dismissal without prejudice and a consent to that dismissal by defendants Duke University, David F. Paulson and Michael J. Moran, was the request for dismissal automatically effective as a notice of dismissal without Order of Court under Rule 41(a)(1) despite the fact that the request was framed as a Rule 41(a)(2) motion?

2. Even if the plaintiff did not invoke a Rule 41(a)(1)(ii) dismissal of right when he filed his motion for dismissal, was it an abuse of dis-

cretion and error for the Court to deny plaintiff's 41(a)(2) motion for a voluntary dismissal without prejudice as to defendants Duke University, David F. Paulson and Michael J. Moran when these defendants consented to such dismissal, the remaining defendants stated that they had no objection to the dismissal and no cross-claims had been filed between the defendants?

3. Even if the plaintiff did not invoke a stipulation of dismissal under Rule 41(a)(1)(ii) and even if the Court did not abuse its discretion in refusing to grant plaintiff's Rule 41(a)(2) motion to dismiss the Duke defendants without prejudice, did the Court abuse its discretion and commit error in granting the

Duke defendants' subsequent Rule 41(b) motion for an involuntary dismissal with prejudice?

4. Was it error for the Court to exclude the plaintiff-incompetent from the further proceedings at the trial of this action?

5. Where the Strawcutter group defendants acknowledged that they had not given the plaintiff or his family any warnings of the hazards of the delay in treatment resulting from the transfer of the plaintiff from their care at Southeastern General Hospital to Duke Hospital, when there was substantial evidence at the trial of such hazards caused by such a delay in transferring the patient to another institution and where the plaintiff requested the Court to submit an instruction to

the jury on the duty of the Straw-cutter defendants to warn the plaintiff or his family of such hazards, was it error for the Court to refuse to include in its charge an instruction of negligence to fail to warn the plaintiff or his family of the hazards in delay of treatment resulting from a transfer from one medical institution to another?

APPENDIX B

EXCERPT FROM HEARINGS BEFORE BRITT, J., U.S. DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA, APRIL 7, 1981.

NOTE: Language which appears hereafter in parentheses reflects language taken verbatim from the Court transcript of the subject hearing; language appearing in brackets has been added by counsel to Respondents to reflect what Respondents submit would be a proper transcription of the oral statements made in open Court or to supply proper grammatical context; no change of substantive content, however, has been made.

All right, I've got a Motion by Duke Defendants to dismiss for failure to answer an interrogatory.

Mr. Murray: Yes, Your Honor. We would like to be heard on that. It does, in fact, trigger two oral motions and they are oral and not written for reason of the timing of the Answers to Interrogatories which, I understand, were filed by Plaintiffs either yesterday or today.

The pertinent chronology is as follows, Your Honor. On the day of September 14, 1979, the Duke Defendants propounded to the Plaintiffs a very extensive first set of written interrogatories. To make short of long, the thrust of those interrogatories sought to focus upon what (evidential) [evidentiary] material the Plaintiffs have, if any, to support any contention of negligence on the part of the Duke Defendants. Those written interrogatories went without answer.

On June 23, 1980, a second set of written interrogatories were propounded by the Duke Defendants to the Plaintiff, the essence of which was two questions. (The) [Q]uestion number 2 would not be reached if question number 1 was answered negatively. For that purpose, I shall read simply one question. That was this,

to wit: "Is there any person that Plaintiff expects to call as an expert witness at the trial (and) [in] the prosecution of the case (that's) [as] to Duke University, David F. Paulson, Michael J. Moran and Lewis Gonzales Servo.[?]"

In response to that, apparently either yesterday or today, we were handed a copy of what is denoted as Plaintiff's Answers to the Interrogatories of the Duke Defendants. Without reading that verbatim, I do focus upon three points which have been set forth in these written answers, these having been verified, I believe, by the guardian for the incompetent Plaintiff. At the top of Page 2, "Plaintiff has presently no testimony prepared to present against the Duke Defendants."

In the next paragraph on Page 2, "Plaintiff is not at this time desirous

of presenting a case against the Duke Defendants." In the last paragraph, "We are in the anomalous position of having Defendants against whom we at this time do not wish to litigate in the case."

We had filed a motion to dismiss (a) [under] Rule 37 which is addressed to compelling discovery, but now in view of these answers, a form of answers, which (has) [have] been filed with the Court (and very fine) [in verified] form, we would like to make a[n] oral motion for an involuntary dismissal under Rule 41, subsection (b) of the Federal Rules of Civil Procedure.

[Under] Rule 41, Subsection (b), the involuntary dismissal section, most of the case law develops under the second sentence and [the language of the rule which appears] thereafter which is addressed to a non-jury trial and the point

of the trial at which the Plaintiff rest[s] its case. However, there are a number of cases - reported cases - [in] this jurisdiction as well as [in] other jurisdictions (under) [which are addressed to] the first sentence of 41(b). It reads as follows, "Involuntary Dismissal. For failure of the Plaintiff to prosecute or to comply with these rules or any order of the Court, a Defendant may move for dismissal (or) [of] an action [or] of any claim against him." The annotations to that particular rule reads," The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or comply with the Rules (to) [or] any order of court, and the general provisions of the last sentence remain applicable in jury as well as non-jury cases."

We argue at this time that the answers filed yesterday would qualify the Duke Defendants to move at this time for an involuntary dismissal of the case against them for failure to prosecute. As set forth in length, in the Wright and Miller work on civil procedure, Federal Practice & Procedure which I believe is in your Honor's library, Section 2370, Footnote 12, sets forth the many reported cases under failure to prosecute. It can, in fact, even come up at the pre-trial conference stage.

There is a Fourth Circuit decision on it, [Krodel vs. Houghtoling], which I take it is in this jurisdiction as the Fourth Circuit, 1972, 468 F2d 887, certiorari was denied by the U.S. Supreme Court, where the gist of (it) [the decision] is: where the Plaintiff had ample opportunity to develop evidence in sup-

port of his action for malicious interference with contract rights, but neither interviewed nor subpoenaed witnesses (his) [whose] whereabouts he knew, dismissal [of the] action for lack of prosecution was within the trial court's sound judicial (expression) [discretion].

Whether it develops under [a] failure to prosecute or a breach of this Court's rules, we would say an involuntary dismissal would be apt in this case in any event. Under your local rule, I believe, 25.03, Subsection (f), it (was) [is] incumbent upon the Plaintiffs not only to give us the names and addresses of witnesses they might use against us, but [also to give us] a brief narrative of anything they would say to assign to the Defendants any type of negligence for which they had to account. No such synopsis (was) [has been] given.

Your Honor, again in the federal procedure in Moore's Federal Practice, the same subject is treated under Section 41.11, and it appears at page 41-130 of Volume V, where an involuntary dismissal is properly entered (where) by statement on the day of the - on the day set for trial, [and] the Plaintiff does not wish to proceed with the suit - (or) [such will] qualify the moving Defendants for an involuntary dismissal. Not only do we have a statement, we have it set forth (and) [in] verified [and] in written form and signed not only by the counsel for the Plaintiffs, but verified by the Plaintiff himself, that they do not desire to proceed against Duke.

We are put in the very unhappy position of having to prepare for a lengthy and vexatious trial when the Plaintiffs in verified form have said

that they have no witnesses they intend to put on [to prove] a case (with) against Duke and do not desire to proceed against Duke.

That is the first of the two motions and it can be reduced to written form and filed with the Court. We wanted to argue it at length in definitive fashion orally and it has not been put in writing because we only had (this one) [our interrogatories] answered yesterday.

The Court: Let me see that thing.

Mr. Murray: I have the interrogatory number 1 and I have checked off the two places. I will defer continuing argument until after you have had an opportunity to read that.

(Document handed to the Court.)

The Court: All right, you may continue.

Mr. Murray: As I have mentioned, Your Honor, the material in your library sets forth a number of cases where the Court has entered involuntary dismissal under 41(b) in (those) [these] circumstances. There is also case law that will allow for such an involuntary dismissal where a party has failed to list the material required to be included in the pretrial order, such as what they are to say - the witnesses.

The second motion we would like to make orally is one for summary judgment under Rule 56. At least four things need to be addressed. One, the timing of the motion. Number Two, whether such a motion can be made orally. Number Three, procedural requirements, and Number Four, the supporting material.

As far as the timing, the language of Rule 56 states in pertinent part as follows--

The Court: (Interposing) Let me hear from Plaintiff on your first motion.

Mr. Rountree: Judge, at this time, the Plaintiff feels that the (defense) [defendants'] position (of) [on the] 41(b) motion is totally accurate if you deny a 41(a)(2) motion which you've done. And the answers to interrogatories having been filed, and having been very carefully considered by the Plaintiff who did not have evidence from medical experts who have given us permission to use their names, and indicated (unqualifiably) [unqualifiedly] that they were prepared to come testify, I see no alternative for the Court but to dismiss involuntarily in light of the fact that the Duke [Defendants] (is) [are] in the case notwithstanding the efforts of the Plaintiff and Duke to get Duke out, reserving our right to proceed against them to which they consented.

If we can't do that, then our position on the record, obviously, cannot be recanted and Duke wins on this motion as I see it. (Now) [Our] urologists have been the ones objecting to (getting) [letting] Duke out, probably [because] they have more knowledge about it than I do.

Mr. [Clay]: Excuse me, sir. Your Honor, we're not involved in this motion in any way. I just -

The Court: (Interposing) We have urologists getting out.

Mr. Clay: Well I can't let that pass. We have never objected to Duke getting out. We have simply refused to--

The Court: (Interposing) Gentlemen, I am completely aware of the whole gambit of what's happening on these motions. The Court takes full responsibility for it[s] rulings on everything that's happening.

Anything further, gentlemen?

Mr. Rountree: Yes, sir. Only the - obviously, the Plaintiff objects to Duke getting out with prejudice in the final analysis. We don't think that's what should be done. And I'm going to state on the record before Your Honor now the 41(a)(2) motion having been denied and [in] the interest [of] having our record, we have nothing to offer to counter their motion for involuntary dismissal.

The Court: Motion of the Duke Defendants under Rule 41(b)(2) is allowed.

Mr. Murray: The other motion is moot.

The Court: Reduce your motion to writing and file it with the Court, please.

Mr. Murray: Thank you, Your Honor.

Could I verify that (that has been filed with) [the original of the] answers

[to interrogatories have been filed] and can I conform my copy?

Mr. Rountree: They were filed yesterday.

Mr. Murray: Can I conform my verification with that?

APPENDIX C

PLAINTIFF'S ANSWERS TO THE INTERROGATORIES OF DEFENDANTS DUKE UNIVERSITY MEDICAL CENTER, DUKE HOSPITAL, DAVID F. PAULSON, AND MICHAEL J. MORAN, FILED APRIL 6, 1981

1.

Plaintiff, through his counsel, has consulted with critical care physicians at Massachusetts General Hospital and elsewhere concerning the care that plaintiff's incompetent received at Duke University. The opinions of those experts have to date been expressed in entirely oral conferences, and they have prepared no written reports.

Presently plaintiff is not in a financial condition to adduce written opinions or testimony from these experts and for this reason had heretofore moved to dismiss his action against Duke University, Dr. David F. Paulson and Dr.

Michael J. Moran, to which these defendants had consented.

Without more time and funds at his disposal plaintiff is unable to put on a case against these defendants and is still desirous of dismissing, without prejudice, his action against these defendants, with leave to refile the action in the State Court if, after the litigation pending against other defendants, he deems it in the best interest of plaintiff's incompetent to do so, a decision he cannot make until that litigation is completed.

Being presently without the necessary funds or time to prepare his case against Duke University, and Drs. Paulson and Moran, and unsure as to whether or not, after trying his case against Defendants Strawcutter, Leininger and Burleson, he would see fit to litigate

further against Duke and Drs. Paulson and Moran, plaintiff has presently no testimony prepared to present against the Duke Defendants.

The nature of the claims against the Duke defendants would differ in several material aspects from the nature of the claims against Defendants Strawcutter, Burleson and Leininger as would the proof of those claims and would require the expert testimony of witnesses with different training, experience and expertise than those witnesses whom plaintiff plans to present in proof of his claim against Defendants Strawcutter, Burleson and Leininger.

While plaintiff has consulted informally with such experts, he has no affidavits and no written reports from these experts, all of which is material he expected to prepare in due course

provided he elected to pursue the claims against Duke defendants after their dismissal without prejudice, and which he is not at this time able financially or time wise to adduce while preparing to litigate his case against Defendants Strawcutter, Burleson and Leininger.

In the event that he were to be permitted to dismiss his present action against the Duke defendants and thereafter, indeed, did elect to refile those claims, he would at that time first be able to decide which experts he would use to testify in that action. As yet he has made no such decision either as to whether or not to so litigate and, if he did litigate, which of the numerous available experts he would seek to retain to testify in the cause.

For all of these reasons, plaintiff is not presently able to supply, except

as here set forth, the information requested in this interrogatory. Plaintiff is not, at this time, desirous of presenting a case against the Duke defendants, which is why he sought the dismissal to which the Duke defendants consented, and Duke University, Dr. David F. Paulson and Dr. Michael J. Moran are at this time defendants in this case despite plaintiff's sincere and sustained efforts to dismiss the actions as to them, all as set forth in his motion to dismiss and his motion that the Court reconsider its ruling denying the said dismissal.

We are in the anomalous position of having defendants against whom we, at this time, do not wish to litigate in the case despite our best efforts to have them dismissed from the case and despite their consent to the said dismissal.

We know no other information in this regard which we can furnish you at this time.

2.

See answer to interrogatory number 1.

3.

See answer to interrogatory number 1.

4.

See answer to interrogatory number 1.

5.

See answer to interrogatory number 1.

6.

See answer to interrogatory number 1.

7.

See answer to interrogatory number 1.

8.

See answer to interrogatory number 1.

9.

See answer to interrogatory number 1.

10.

See answer to interrogatory number 1.

11.

See answer to interrogatory number 1.

12.

See answer to interrogatory number 1.

13.

See answer to interrogatory number 1.

14.

See answer to interrogatory number 1.

15.

See answer to interrogatory number 1.

16.

See answer to interrogatory number 1.

17.

See answer to interrogatory number 1.

18.

See answer to interrogatory number 1.

19.

See answer to interrogatory number 1.

20.

See answer to interrogatory number 1.

21.

See answer to interrogatory number 1.

See answer to interrogatory number 1.

McCAIN & MOORE
702 West Cobb Street
Durham, North Carolina
27702
Telephone No.: 919-682-5751

And

ROUNTREE & SEAGLE
11 South Fifth Street
Wilmington, North Carolina
28401
Telephone No.: 919-763-3404

BY:/s/ George Rountree, III
GEORGE ROUNTREE, III
(Attorneys for
Plaintiff)

****

HENRY CYLDE MORRELL, first being duly sworn, deposes and says as follows:

That he is the plaintiff in the above entitled matter and has read the foregoing Answers to Interrogatories and

knows the contents thereof; that the same are true to his own knowledge save and except those things stated on information and belief, and as to those he believes it to be true.

This the 6th day of April, 1981.

/s/ Henry Clyde Morrell
HENRY CLYDE MORRELL

Sworn to and subscribed to before me, this 6th day of April, 1981.

/s/
NOTARY PUBLIC

My commission expires: 3-11-86

(SEAL/STAMP)

APPENDIX D

BENCH CONFERENCE OF MAY 13, 1981,
REGARDING THE CHARGE TO THE JURY,
BEFORE THE HONORABLE W. EARL BRITT,
UNITED STATES DISTRICT COURT JUDGE

Mr. McCain: I take it that you took out the charge of failure to inform?

The Court: In the form of consent, yes.

Mr. McCain: Can the record so show that we requested that as a charge?

The Court: Yes, sir. Now, let me say this, that federal rules require great specificity and you may do whatever you want to to try to protect yourself but they are very very tough on that. You have to be quite specific. Now, it may be that you can do it by reference and request the form of consent charge as set forth in the North Carolina pattern jury instructions. That would satisfy the rule. I'm not saying that it will or

won't. I'm just telling you that you've got to be very specific.

Mr. McCain: Can I refer my reference to your earlier suggested charge?

The Court: That doesn't appear in the record is my problem. I'm trying to help you to do anything you can to protect yourself because I've only been on the job about a year and all I know is from reading the decisions. They are mighty tough, but you have got to be very specific and I will allow you, if I'm permitted, to supplement your request for the written part.

Mr. McCain: It would just be your earlier suggested charge.

The Court: Well, you can get those pages and have Susan put them in the record. That will be requested by you and let the record reflect that the court earlier had that in its charge and upon reflection

felt that it was no issue apprising as to formal consent and a charge on that would be inappropriate under the circumstances.

Mr. McCain: Thank you very much.

APPENDIX E
RULES OF PRACTICE AND PROCEDURE IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

26.06: Jury Cases. In all jury cases, counsel shall file with the clerk:

(a) a list of any voir dire questions as required by Local Rule 6.02;

(b) requests for jury instructions with citations to supporting authorities; and

(c) proposed issues to be submitted to the jury.

CERTIFICATE OF SERVICE

The undersigned herewith certifies that he has this day caused the foregoing Respondents' Brief to Plaintiff's Petition for a Writ of Certiorari to be served upon the attorneys of record to Plaintiff-Petitioner by causing (3) copies to be deposited in an official depository under the exclusive care and custody of the United States Postal Service with first-class postage fully prepaid, properly addressed to each of said attorneys at his last-known mailing address, they being:

Grover C. McCain, Jr., Esq.
(Counsel of Record)
Jeff Erick Essen, Esq.
McCain, Essen & Orcutt
Attorneys at Law
100-E Franklin Square
1829 East Franklin Street
Chapel Hill, N.C. 27514

-and-

George Rountree, III, Esq.
J. Harold Seagle
Rountree & Seagle
Attorneys at Law
11 South Fifth Street
Wilmington, N. C. 28401

This the 22nd day of October 1982.

JOSIAH S. MURRAY, III
Counsel of Record
Newsom, Graham, Hedrick,
Murray, Bryson, Kennon
and Faison
Suite 400 - Wachovia Bldg.
Post Office Box 2088
Durham, NC 27702
Telephone: (919) 682-5671

Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82 534

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DUKE UNIVERSITY, INC., et. al.,
Respondent

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DR. HOWARD E. STRAWCUTTER, et. al.,
Respondent

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Grover C. McCain, Jr.
Counsel of Record
Jeff Erick Essen
McCAIN, ESSEN & ORCUTT
1829 E. Franklin Street
100-E Franklin Square
Chapel Hill, North
Carolina 27514
(919) 967-0811

Counsel for Petitioner

George Rountree, III
J. Harold Seagle
ROUNTREE & SEAGLE
11 South Fifth Street
Wilmington, North
Carolina 28401

Counsel for Petitioner

NO. 82 534

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DUKE UNIVERSITY, INC., et. al.,
Respondent

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DR. HOWARD E. STRAWCUTTER, et. al.,
Respondent

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Grover C. McCain, Jr.
Counsel of Record
Jeff Erick Essen
McCAIN, ESSEN & ORCUTT
1829 E. Franklin Street
100-E Franklin Square
Chapel Hill, North
Carolina 27514
(919) 967-0811

Counsel for Petitioner

George Rountree, III
J. Harold Seagle
ROUNTREE & SEAGLE
11 South Fifth Street
Wilmington, North
Carolina 28401

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii

I. 1.A. THE COURT OF APPEALS BELOW CLEARLY FOLLOWED THE HARVEY ALUMINUM DEFINITION OF THE WORD "ACTION" IN RULE 41(a). 1

B. IF THE FOURTH CIRCUIT'S DENIAL OF PLAINTIFF'S RULE 41(a)(1)(ii) CLAIM WAS ACTUALLY BASED ON THE COURT'S PERCEPTION THAT A TRIAL COURT HAS DISCRETION TO ACCEPT OR DENY SUCH A STIPULATION OF DISMISSAL (AS DEFENDANT-RESPONDENTS NOW CLAIM) THEN THAT HOLDING IS CERTAINLY IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS. 4

2. THE FACTUAL BACKGROUND OF THIS CASE SQUARELY PRESENTS SEVERAL IMPORTANT QUESTIONS REGARDING FEDERAL RULE OF CIVIL PROCEDURE 41 WHICH RECUR CONTINUALLY AND CAN ONLY BE RESOLVED BY THE SUPREME COURT; FURTHER, SINCE THIS CASE INVOLVES RULES 41(a)(1), 41(a)(2) and 41(b), THIS COURT HAS AN OPPORTUNITY TO CONSISTENTLY AND CONCLUSIVELY INTERPRET THE OPERATIVE TERM "ACTION" THROUGHOUT RULE 41. 6

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE ALLOWED WITH RESPECT TO THE ISSUE ARISING UNDER RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE. THE STRAWCUTTER DEFENDANTS INVOKE LOCAL RULE OF PRACTICE 26.06 IN THEIR BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI. IN THE CONTEXT OF THIS CASE, HOWEVER, THAT RULE IS A RED HERRING. 9

TABLE OF AUTHORITIES

CASES	PAGE
First National Bank of Toms River N.J. v. Marine City, Inc., 411 F.2nd 674 (3rd Cir. 1969)	5
Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2nd 105 (2nd Cir., 1953), cert. denied, 345 U.S. 964 (1953)	2
In Re International Business Machines Corporation, No. 1406 (2nd Cir. August 13, 1982).	6

I. 1.A. THE COURT OF APPEALS BELOW CLEARLY FOLLOWED THE HARVEY ALUMINUM DEFINITION OF THE WORD "ACTION" IN RULE 41(a).

Defendant-respondents "concede that there is a dichotomy in the decisional law with respect to the question of whether the dismissal of an 'action' under Rule 41(a) may be limited to claims or causes of action against one of several defendants" (Respondent's Brief pp.7-8). They argue, however, that this question was "not addressed" by the Court of Appeals below and discount "Petitioner's contentions that the Fourth Circuit has now adopted the Harvey Aluminum rule. . ." (Id. p.7).

Defendants' argument is predicated on their misconception that the word "action" can have different meanings within the same sentence of Rule 41(a) and, with this misconception dispelled, the Rule 41(a) issues presented in this appeal are, in fact, clearly raised by the opinion below. Rule 41(a)(1) reads in relevant part as follows:

> . . . an action (#1) may be dismissed by the plaintiff without an order of court. . . by filing a stipulation of dismissal signed by all parties who have appeared in the action (#2) (emphasis and numerals added).

Rule 41(a)(2) reads in relevant part as follows:

> Except as provided in paragraph (1) of this subdivision of this Rule, an action (#3) shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper (emphasis and numeral added).

Defendant argues, in effect, that the Court of Appeals did not face the question of how to define "action #1" and "action #3" but defendant ignores the fact that the lower Court did, indeed, define "action #2" by following the errant interpretation of that word enunciated in Harvey Aluminum, Inc v. American Cyanamid Co., 203 F.2d 105 (2nd cir. 1953), cert. denied, 345 U.S. 964 (1953).

The concurring opinion in the Court of Appeals states that "because [plaintiff] did not receive the consent of all defendants, he was unable to proceed within the letter of Rule 41(a)(1)(ii)" (Petition for Writ of Certiorari

p.72). Since plaintiff had received the consent of all defendants to be dismissed, it is clear that the writer of this opinion interpreted "action #2" as encompassing all of the claims against all of the defendants - the Harvey Aluminum definition of "action." The primary opinion directly cites Harvey Aluminum and dismisses plaintiff's Rule 41(a)(1)(ii) argument with the comment that plaintiff's "stipulation" of dismissal was only "allegedly signed by all parties who had appeared in the action" (emphasis added) (Petition for Writ of Certiorari p.54). Again, since plaintiff had received the consent of all defendants to be dismissed, it is clear that the Court interpreted "action #2" as encompassing all of the claims against all of the defendants and denied plaintiff's Rule 41(a)(1)(ii) claim based on that erroneous definition.

Plaintiff disputes defendants' implied contention (explicitly argued in their brief below) that the word "action" can have opposite

meanings within the same sentence of Rule 41(a). All rules of grammar, logic and statutory construction refute defendants' position and this Court must recognize that the very fact that defendants have raised such an argument reveals the degree of confusion which has arisen around Rule 41(a).

Admittedly the Court of Appeals below did not explicitly state that a Rule 41(a) dismissal could not be effected against less than all of several defendants and did not explicitly state that it was following the minority view of Harvey Aluminum - a view soundly criticized by virtually every scholar and court to face the issue. Like personal transgressions, however, judicial error is seldom advertised by the wrongdoer and this Court should not close its eyes to the Fourth Circuit's furtive courtship of the fallen Harvey Aluminum doctrine.

B. IF THE FOURTH CIRCUIT'S DENIAL OF PLAINTIFF'S RULE 41(a)(1)(ii) CLAIM WAS

ACTUALLY BASED ON THE COURT'S PERCEPTION THAT A TRIAL COURT HAS DISCRETION TO ACCEPT OR DENY SUCH A STIPULATION OF DISMISSAL (AS DEFENDANT-RESPONDENTS NOW CLAIM) THEN THAT HOLDING IS CERTAINLY IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

Defendants have conceded that the issue of whether or not plaintiffs effected a Rule 41(a)(1)(ii) dismissal was properly preserved for appeal (Petition for Writ of Certiorari p.58). A stipulation of dismissal under Rule 41(a)(1)(ii) is either effective or not effective and the trial court's approval or disapproval is irrelevant, First National Bank of Toms River, N.J. v. Marine City Inc., 411 F.2d 674(3rd Cir. 1969). Respondent's brief repeatedly states, without authority, that the question of whether or not a plaintiff has invoked a valid stipulation of dismissal is a matter to be determined within the sound discretion of the trial court. If the Fourth Circuit's denial of plaintiff's Rule 41(a)(1)

(ii) claim was actually based on the Court's perception that a trial court has discretion to accept or deny such a stipulation of dismissal (rather than on a perception that consent is required by all parties to the lawsuit under Harvey Aluminum) then that holding sanctions a trial court's "veto" of an otherwise effective stipulation of dismissal. Such a holding is not only in conflict with the decisions of other Federal Courts of Appeal, but it is also utterly without precedent. Indeed, the Second Circuit has recently held that even in an anti-trust action and even over the strenuous objections of the trial court, a plaintiff and defendant have an absolute right to terminate their litigation under Rule 41(a)(1)(ii), In Re International Business Machines Corporation, No. 1406 (2nd Cir. August 13,1982).

2. THE FACTUAL BACKGROUND OF THIS CASE SQUARELY PRESENTS SEVERAL IMPORTANT QUESTIONS REGARDING FEDERAL RULE OF CIVIL PROCEDURE 41 WHICH RECUR CONTINUALLY AND CAN ONLY BE

RESOLVED BY THE SUPREME COURT; FURTHER, SINCE THIS CASE INVOLVES RULES 41(a)(1), 41(a)(2) and 41(b), THIS COURT HAS AN OPPORTUNITY TO CONSISTENTLY AND CONCLUSIVELY INTERPRET THE OPERATIVE TERM "ACTION" THROUGHOUT RULE 41.

In section I.3. of their Brief in Opposition, respondents argue that "the unusual factual background of this case makes it unlikely that similar situations will recur" (p.21). It is true that the brain-damaged Sammy Morrell has been deprived of an opportunity to seek compens' 'on for adequate nursing and rehabilitative care based on an incredible and unusual chain of events. The procedural issues which led to this manifestly unjust result, however, arise at least implicity on each occasion where a dismissal is sought in federal court against less than all of several defendants - whether at the plaintiff's instance under Rule 41(a) or at the defendant's instance under Rule 41(b).

Indeed, the complicated factual development of this case provides this Court with an

excellent opportunity to analyze the policies behind Rule 41 and to conclusively and consistently define the operative term "action" at its various appearances in the Rule. Multi-party litigation is becoming increasingly more common and the time has come for this Court to fully and finally determine the correct procedure for dismissing one of several defendants - a procedure alluded to but not defined by the Fourth Circuit (Petition for Writ of Certiorari, p.50).

In 1953 this Court refused certiorari in the Harvey Aluminum case and in the ensuing 29 years the lower federal courts have agreed, almost unanimously, that the Harvey Aluminum doctrine is fallacious. At this point in time, courts no longer openly embrace that doctrine but the minority case law still exists, like an unused well, with no function save as a trap for the unwary. Sammy Morrell stands, today, at the bottom of that well and only this Court can intervene to lift him out and block off the trap left by Harvey Aluminum.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE ALLOWED WITH RESPECT TO THE ISSUE ARISING UNDER RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE. THE STRAWCUTTER DEFENDANTS INVOKE LOCAL RULE OF PRACTICE 26.06 IN THEIR BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI. IN THE CONTEXT OF THIS CASE, HOWEVER, THAT RULE IS A RED HERRING.

It is true that the local rules require counsel to submit proposed instructions prior to trial and that the proposed instructions filed by plaintiff did not include informed consent language. The informed consent issue only arose during the trial, however, when the defendants testified - in contradiction to Sammy Morrell's medical records - that they had actually diagnosed his perinephric abscess prior to transferring him to Duke Medical Center. Even if Local Rule 26.06 were held to take priority over Federal Rule 51, the circumstances of this case could not preclude the plaintiff from requesting an informed consent charge after the defendants' surprise testimony.

Respondents' recitation of the facts is somewhat misleading. It is true that at the charge conference respondents argued that the language of the pattern jury instructions on informed consent did not fit the facts of the case and would have been misleading and confusing to the jury. At the charge conference, however, the trial court agreed with the arguments of plaintiff's counsel that the applicability of such instruction outweighed any possible confusion. It was only after closing arguments had already been made that the court, in violation of Rule 51, changed its position and deleted the informed consent charge. The issue in the Stawcutter appeal is clear and of significance to all federal litigants: does Rule 51 allow a trial court to delete critical instruction agreed to at the charge conference after closing arguments have already been made? Plaintiff respectfully requests that this petition for a writ of certiorari be granted in order to fully explore the issue discussed herein.

This 3 day of ~~October~~ November, 1982.

Grover C. McCain, Jr.
Counsel of Record

Jeff Erick Essen
McCAIN, ESSEN & ORCUTT
100-E Franklin Square
1829 E. Franklin Street
Chapel Hill, NC 27514
(919) 967-0811

George Rountree, III

J. Harold Seagle
Rountree & Seagle
11 South Fifth Street
Wilmington, NC 28401

CERTIFICATE OF SERVICE

The undersigned herewith certifies that he has this day served Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari upon each of the attorneys of record of Respondent by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to each of said attorneys at their respective last known mailing addresses, they being:

Josiah S. Murray, III
Newsom, Graham, Hedrick,
Murray, Bryson & Kennon
Attorney at Law
P. O. Box 2088
Durham, North Carolina 27702

W. Osborne Lee
Lee & Lee
Attorney at Law
407 North Elm Street
Lumberton, North Carolina 28358

Hal W. Broadfoot
Anderson, Broadfoot & Anderson
Attorney at Law
P. O. Box 474
Fayetteville, North Carolina 28302

Robert M. Clay
Johnson, Patterson, Dilthey & Clay
Attorney at Law
P. O. Box 310
Raleigh, North Carolina 27602

This 3 day of ~~October~~ November, 1982.

Grover C. McCain, Jr.
Counsel of Record
McCAIN, ESSEN & ORCUTT
100-E Franklin Square
1829 E. Franklin Street
Chapel Hill, NC 27514
(919) 967-0811